IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE UNITED STATES, *Appellant,* vs. EARL B. COE, *Appellee.*	*No. 45. Appeal from the Court of Private Land Claims.*

STATEMENT AND BRIEF FOR APPELLEE.

STATEMENT.

An examination of the archives and records of the state of Sonora, in the republic of Mexico, and the title papers in this case, discloses the following uncontroverted facts, all of which fully appear in the record:

On the 4th day of January, 1838, Senor Don Fernando Rodriguez, a Mexican citizen, residing in the city of Hermosilla, in the state of Sonora, made written application to the treasurer general of the state for the sale to him of certain of the vacant lands of the state, being the land involved in this controversy.

On the 12th day of January, 1838, Jose Justo Milla, the auditor and acting treasurer general of Sonora, made an order appointing Mauricio Carrillo as a commissioner, to measure, survey and appraise the land applied for, authorizing him to appoint necessary assistants, give notice to all parties interested, and proceed to the land; the commissioner was required, upon the completion of his work, to transmit all of his proceedings, and make a report of all his doings to the treasurer general.

On the 12th day of January, 1838, the commissioner, Carrillo, accepted the appointment, and appointed Don Juan Rios Candelario, Jose Maria Sais, Don Julian Padillo and Don Alonzo Maria Frecarra as his assistants, and as the official measurers, counters and markers to accompany him.

These persons accepted their appointments, and took the necessary oaths to properly discharge their duties.

On February 3, 1838, on the land, the commissioner, Carrillo, and his assistants, in the presence of Rodriguez and the escort who had accompanied them, measured and surveyed the land and placed monuments thereon as required by law.

On March 8, 1838, after having returned to the capital city, from whence they started, the commissioner, Carrillo, appointed Don Alonzo Maria Frecarra and Juan Rios Candelario as appraisers, to value and appraise the land. They performed this duty, valuing the same at the rate of $80 per square league, or $400 for the five square leagues surveyed.

On the same day, the proceedings for the valuation and measurement of the land having been concluded, the commissioner, Carrillo, ordered that thirty public offers of sale be made; that notice be given of such sale and bidders solicited; and he thereupon notified the judge of the first instance of the district of the proceedings already had, requesting that the judge give notice of the sale in all the pueblos of the district.

On March 9, 1838, the first public offer of sale was made by the official auctioneer, and thereafter the thirty offers of sale required by law were made, each of which are properly certified to by the commissioner, Carrillo.

On April 7, 1838, no purchaser having appeared, the commissioner, Carrillo, transmitted all of his proceedings to the treasurer general of the state for final action. On the same day the treasurer general referred all the proceedings to the promotor fiscal (attorney general) for his consideration and opinion.

On the 8th day of April, 1838, Jose Carrillo, the promotor fiscal (attorney general) certifies that he has carefully examined the proceedings; that the same are regular and in due form of law, and asks that the treasurer general order three additional public offers of sale, the same to be made by the junta de almoneda (board of sale), and that the land be sold to the highest bidder, and title issued to the purchaser.

On the same day, Milla, acting as treasurer general, orders that three public offers of sale be made, in accordance with the opinion of the attorney general, and in the manner prescribed by law. Thereafter these three public offers of sale were made by the junta de almoneda, consisting of the treasurer general, the comptroller or auditor, the judge of the first instance and the administrator of revenues. At the last offer of sale, the land was sold by this board to Senor Don Fernando Rodriguez for the sum of $400, he being the highest bidder. Each of these offers of sale are duly certified to by the three mem-

bers of the board participating in the sale. (Jose Justo Milla, being the auditor or comptroller, and at that time acting as treasurer general, but three officers participated in the sale.)

At the conclusion of the sale, Rodriguez was notified to pay into the treasury the $400 that he was to pay for the land, $6 for fees of the last sale, and $30 for the title that was to be issued, which he agreed to, and did do.

On the 12th day of April, 1838, the proceedings for the sale of the land having been completed, Jose Justo Milla, acting as treasurer general, issued in due form a title to Don Fernando Rodriguez, in fee simple, delivering to him the testimonio thereof, and certifying that the original expedienti of the title remained in the custody of the treasurer general, as the perpetual evidence of the sale. On the same day, Milla certifies that the purchase money, fees and charges, paid by Rodriguez for the land, is properly noted in the "libro manuel" of accounts for that year.

On the 13th day of April, 1838, Leonardo Escalante, governor of the state, replying to a note of Milla's, written on the day before, asking for an approval of the sale of the land to Rodriguez, certifies that he approves the same.

On the 27th day of March, 1838, Juan Jose Encinas, alcalde of the city of Hermosilla, certifies as to Rodriguez having sufficient means to stock and cultivate the land applied for, which certificate Milla directs annexed to the original proceedings.

The above includes all of the proceedings had up to the time of the delivery of the title to the purchaser.

After the purchase of the land by Rodriguez, the following proceedings relating thereto were had:

On December 21, 1840, Jose Maria Mendosa, treasurer general of the state, who was also the elected treasurer general at the time of the sale of the land in this case to Rodriguez, received an order from the supreme government of the nation relative to grants made by the state, and directing that the expedienti and other papers, evidencing title theretofore issued, and which had previously been presented to an agent of the national bank, should be returned to the proper archives of the state.

On the 30th day of May, 1841, Jose Maria Mendosa certifies that, by virtue of the foregoing order, the expedienti and other documents in relation to this land have been returned to the office of the treasurer general of the state.

On the 6th of June, 1847, Jose Maria Mendosa certified that he transmitted the expedienti and other

papers in this case to the supreme government, at Mexico, he having theretofore corresponded with the supreme government relating to the title.

On the 8th of June, 1847, Jose de Aguilar, governor of the state, certifies that the sale of the land to Rodriguez was in every respect legal; that the signatures of the different officers signing the different title papers are genuine, and that the sale or grant has been approved by the supreme government.

On the 15th of January, 1858, Jose Maria Mendosa, treasurer, and Florencio Trejo, second officer of the treasury, certified that they had examined the title papers of this grant, and that the same are in every respect genuine.

On the 10th day of September, 1858, Governor Ygnacio Pesquerro certified to the genuineness of the signatures of the officers signing the foregoing certificate.

The land involved in this controversy having, with other lands, been ceded to the United States, by virtue of the Gadsden treaty of 1853, this suit was instituted by the appellee, who had, by virtue of different mesne conveyances, become the owner of the same, for the confirmation of his title.

The appellee contends that his title was "complete and perfect" at the date of the cession of the land

to the United States, and asks for a confirmation under section 8 of the act of congress approved March 3, 1891. The petition for this purpose was presented to the Court of Private Land Claims on the 2d day of February, A. D. 1892. (Record, page 3.)

The answer of the United States raises the question of the genuineness of the title papers, and specifically denies many of the allegations of the petition. (Record, page 31.) The answer, however, does not raise many of the questions now presented by the brief of the United States, for the consideration of the court.

It was stipulated between counsel at the time of the decision of the court at Tucson, that the petition might be amended so as to cover the questions presented in argument, that the grant was made by national officers and recognized and approved by the national government. This stipulation, for some reason, does not appear in the record.

The opinion of the court, and the decree entered thereon, is in harmony with the amendment agreed to.

The case was tried before the Court of Private Land Claims, after the judges of that court had personally examined the archives of the state of Sonora, and testimony had been taken before them in that state, and a decree confirming the title ordered at

Tucson, Arizona territory, on the 24th day of February, 1893. By stipulation of parties the decree was entered and recorded at Santa Fe, New Mexico, as of February 24, 1893. From the judgment of the Court of Private Land Claims, the United States appeals to this court.

BRIEF AND ARGUMENT.

At the commencement of this argument the writer states that he is conscious of his inability to present the questions involved in this case, in that manner which their importance deserves.

I am under many obligations to Messrs. Frederick Hall, of the California bar; Rochester Ford, of the Arizona bar; and John H. Knaebel, of the New Mexico bar, for valuable suggestions and assistance. These gentlemen are accomplished in the Spanish language and have given special attention and study to the laws, usages and customs of Mexico.

The obstacles surrounding an investigation of the laws of the republic of Mexico, and the legislation of the states forming the National Union, make the task most difficult. A country without reports of decisions; one that has undergone so many changes of government; whose written history is based so largely on assumed usages and customs, secret orders and intrigues; where the data is so imperfect, changes of

government so sudden, and the reasons therefor so little understood, that the most careful study of their "plans," "schemes," and "systems" of government leaves the mind confused, and makes the task of the practitioner, particularly if he be unacquainted with the language and customs of the people, an undertaking that can only be appreciated by those who have made the attempt.

We had assumed, until we read brief and argument of counsel for the government, that since the taking of the testimony, examining of the original records and archives in Mexico by the judges of the Court of Private Land Claims, and the decision of that court, that a discussion of the genuineness of the title papers, or any question concerning their execution and delivery, was unnecessary.

Says Mr. Justice Sluss, in delivering the opinion of the court below: "The evidence in this case is sufficient to show the title papers to be genuine." This statement of the court is concurred in by the two justices who dissented from the opinion. It now, however, appears that counsel understands it to be his duty to discuss several matters—to our mind most unimportant—relating to these proceedings. Having in mind the language of this court, that these titles do not depend "upon the nicest observance of

every legal formality," and the observations of Mr. Justice Grier, in United States vs. Johnson,

> "Nor is it the duty of counsel representing the government to urge microscopic objections against an honest claimant, and urge the forfeiture of his property for some oversight of the commissioners in not requiring proof according to the strict rule of the common law."
>
> *United States vs. Johnson*, 1 Wall., page 388.

And the following from Mr. Justice Field:

> "To these observations, so just and pertinent, we will only add that the United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages and customs of the former government, the principles of equity, and the decisions of the Supreme Court, so far as they are applicable. They have not desired the tribunals to conduct that investigation as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce

forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded."

United States vs. Auguisola, 1 Wall., page 358.

Not doubting that in the consideration of this case, the court will take a broad and liberal view of the obligations of the government of the United States, and apply those generous equities which are due from a great nation passing upon the rights of citizens in ceded territory, we will take as little of your honors' time as possible in replying to the suggestions of counsel regarding the grant and proceedings under consideration. His observations are critically technical, and in great part (if not altogether) in no wise go to the merits of this controversy, or the regularity or genuineness of these grant papers or proceedings.

Complaint is made because each of the assistants of the commissioner, Carrillo, did not sign certain of the certificates, and it is said that no reason is given for this failure. (Appellant's brief, pages 4-5.) The record (pages 10-11), however, discloses that each of these certificates is signed by all *who knew how to write*. We are then told (brief, page 6) that it does not appear whether advertisement was made in the district where the land was situated. The district referred to was called Guadaloupe del Alter. Jose

Carrillo, attorney general, to whom all of these proceedings were submitted for his examination, opinion and report thereon, reports to the treasurer general (record, page 16) that the commissioner did not summon the *colindantes* (adjoining proprietors), "*because there was none.*" And in the same report he says: "Neither does it appear that any interested party appeared from the District Guadaloupe del Alter, to which judge of the first instance the commissioner, Don Mauricio Carrillo gave at the proper time the necessary official notice of the proceedings in relation to the sale of said vacant lands." Again it is said, that Rodriguez had an advantage over other bidders, on account of the condition upon which he informed the authorities he would purchase this land. (Brief, pages 7-9, 10.) How this is possible when many public offers of sale were made, the petition and all other proceedings being public records, subject to the inspection of any one, we fail to understand.

Pages 10 and 11 of brief speak of the *expediente testimonio* and the book *Toma de Razon.* We do not at all agree with counsel's conclusions here broadly stated without authority for their support. But, as we will discuss these matters under another head—Record of the Grant—we pass them now.

In discussing several certificates of different Mexican officials offered in evidence (brief, pages 14, 15, 16, 17), counsel for the first time in this case suggests that the following of these certificates may not be genuine, namely:

(L. S.)
Commissary General,
State of Sonora.

JOSE MARIA MENDOZA,
Commissary General,
State of Sonora.

I certify that with this date I have sent on a separate sheet, and as a matter of communication, to his excellency, the minister of state and the land office of the republic, the official communication that is the following:

COMMISSARY GENERAL
OF THE
STATE OF SONORA.

Most Excellent Sir—Senor D. Fernando Rodriguez, a resident of the city of Hermosillo, has presented to me the grant title, that the treasury general of the (torn) state executed to his favor on the 12th day of April, 1838, for five sitios of public land for agriculture. The said Senor Rodriguez registered contiguous to the Gila and Colorado rivers, fronting their confluence and the place called the Paso de los Algodones, of

the said Rio Colorado, on the north of this state, and that (torn) surveyed, valued, proclaimed, and sold at auction, given and adjudicated in the terms appearing from the authorized testimonio which I have the honor to send to you with this, to the end that, as I attentively pray, you may bring to the knowledge of his excellency, the president of the republic, which is the object for which the said S. D. Fernando Rodriguez has presented to me the said title of the grant of the confluence of the Gila and Colorado and Paso de los Algodones.

I enjoy the honor of stating to your excellency my greatest veneration (torn) respectful regards. God and liberty.

JOSE MARIA MENDOZA.

Ures, Juna 6, 1847.

His Excellency, the Minister of State and of the Land Office of the Republic Mexico.

And that it may be a record where it corresponds, I extend the present at the request of the interested party, Sr. D. Fernando Rodriguez, at Ures, capital of the state of Sonora, on the 6th day of June, 185 (the last number torn).

JOSE MARIA MENDOZA.
(Rubric.)

Record, 39.

Neither at the trial, nor while the judges of the court below were in Sonora examining these title

papers, records and certificates, was any claim ever made or hinted at, that this was not a genuine document. The title papers were forwarded to the minister of the land department of the nation on the 6th day of June, A. D. 1847, and this certificate of that fact, and the one following (record, 39, 40), when considered in connection with other facts are to my mind conclusive of favorable action by the federal authorities. There is nothing in the record to warrant the statement that federal action was not taken; on the contrary, the record discloses the fact that such action *was* taken. But counsel seems to have overlooked the fact that this communication to the national government concerning the title, and the certificate thereto with its date torn (which must, when considered in connection with other facts, in some way be disposed of, otherwise knowledge and recognition of this grant by the general government is certain) is but a duplicate of the following, which is made part of the claimant's petition and is properly before the court:

> To the Treasurer General of the State:
>
> Jose Maria Mendoza, provisional commissary general of the state of Sonora, certifies that on this day he has directed, under a separate cover, and as a special matter, to his excellency, the minister of state by del despacho de hacienda

of the republic, an official communication of which the following is a copy:

GENERAL COMMISSARY DEPARTMENT
OF THE
STATE OF SONORA.

Sir—The Senor Don Fernando Rodriguez, a resident of the city of Hermosillo, has presented to me the title which was issued in his favor by the general treasury of the ancient state, on the 12th of April, 1838, for five square leagues of vacant lands for cultivation, registered by the said Rodriguez, contiguous to the rivers Gila and Colorado, in front of the confluence of the same and the point named Paso de los Algodones of the said river Colorado, in the northern part of this state, and which were for him surveyed, valued and were sold by the junta de almonedas, and were adjudicated in the manner as shown by the (testimonio autorizado) certified copy, which I have the honor to transmit to your excellency, to the end that the same may be presented to his excellency, the president of the republic, for which purpose the said Senor Rodriguez has presented the said title to me of the land situated in front of the confluence of the Gila and Colorado rivers and the Paso de los Algodones of the Colorado.

I have the honor to repeat to your excellency the consideration of my regard. God and liberty.

JOSE MARIA MENDOZA.

Ures, June 6, 1847.

To His Excellency, the Minister of State of Del Despacho de Hacienda de la Republica Mexico:

In witness whereof, I give this at the request of the interested party, Don Fernando Rodriguez, at Ures, the capital of the state of Sonora, on the 6th of June, 1847.

JOSE MARIA MENDOZA.

Record, 21.

These communications are unquestionably one and the same. It will, however, be noted that the one last quoted states that a *certified copy* of the title papers was forwarded to the supreme government. The difference between the two is slight and evidently one of translation; I am advised that the translation of the communication presented by claimant at the time he filed his petition, is correct. This answers counsel's inquiry as to how these title papers are found in the possession of claimant. A *certified copy* and *not* the *original* was forwarded to the minister of the land department.

Why should not Rodriguez have troubled himself about this title? He sold the land to his intimate

friend of many years, and it would have been strange indeed had he cared nothing about protecting the title to property for which he had been paid $3,000. (Record, page 66.) Common honesty and fair dealing demanded that he do all that was done to protect his friend's estate. Who says these certificates were procured without Juan Robinson's knowledge or consent? No one but counsel, and the record answers the question (brief, page 17): "Who procured these certificates at the various dates they were and are alleged to have been made?" by saying they were procured by the persons who should have procured them—Mr. Rodriguez and Mr. Robinson. Some are made at the request of the former, others at the request of the "party in interest." The old fashioned notion of having title to what one sells and being honest enough to assist in protecting that title, should not be a subject of wonder or evidence of fraud. Robinson trusted Rodriguez. He did not even take a deed from him. He tells us:

"My relations with Fernando Rodriguez were of the most intimate and friendly nature. Fernando Rodriguez sold me the Ranch Paso de los Algodones in exchange for dry goods from my commercial house in Guaymas, in 1847, he at that time living in Hermosillo and I in the port of Guaymas, and, having

every confidence in his integrity, I did not exact from him the execution of the deed in my favor at that time. * * * Fernando Rodriguez handed me the 'expediente' or original title deed obtained from the Sonora authorities at the time of selling me the property, and I held said document and other *important papers* until I disposed of the property El Paso de los Algodones, to The Colorado Commercial and Land Company in 1874. Fernando Rodriguez assured me that the original papers were gotten up in due conformity with the Mexican laws, and that they were full titles and covered in every respect the Ranch El Paso de los Algodones. * * * In April, 1838, Fernando Rodriguez was considered a man of large means, who, independent of a large dry goods store which he kept at Hermosillo, had a cattle ranch a short distance from that city, and was also interested in mining pursuits, and was always looked upon as a man well to do."

Record, pages 62, 63, 65.

What other *important papers* besides the *expediente* were held by Mr. Robinson and delivered to his grantee, who filed them with the surveyor general of Arizona? None but these certificates, and from the office of the surveyor general they were taken and made a part of the record of this case. This

court well understands that these titles "passed from hand to hand by parol" and without formality.

Mr. Justice Baldwin, in Strother vs. Lucas, 12 Pet., page 447, says: "What would now be a splendid fortune would not, fifty years ago, be worth the clerk's fee for writing the deed which conveyed it, and was, therefore, passed from hand to hand by parol, with less formality than the sale of a beaver skin, which a bunch of wampum would buy. The simple settlers of St. Louis then little thought that the time would ever come when, under a stranger government, the sales of their poor possessions, made in the hall of government, at the church door after high mass, entered on the public archives as enduring records of the most solemn transactions, would ever be questioned by strict rules of law or evidence."

The remaining pages—18, 19, 20, 21 and 22—of the statement, discusses the testimony of Juan A. Robinson, and the question of record and possession, which will be given attention in their appropriate order.

We, too, invite especial attention to Mr. Robinson's testimony; and while it was given at a time when he was very feeble and long advanced in years, forgetting no doubt many important matters, it shows his entire faith in the integrity of this transaction. After

all this refined wandering in the statement of the case, and an attempt to cast suspicion on this title, it is said (brief, page 14): "The document, I admit, is in substantially the same form as others during that period, with the exceptions to which I shall call attention." And again, (pages 17-18): "I now admit that the condition of the record tends strongly to prove the genuineness of the signatures of the various persons who purport to have signed the same, but does not entirely overthrow the internal evidence of ante-dating."

We will not attempt to fully consider all of the evidence in support of the grant, but will content ourselves with a brief reference to the same.

All of the officers of the state of Sonora—two United States senators, the governor, secretary of state, assistant secretary of state, treasurer general, attorney general, auditor of state, keeper of the archives, one of the judges of the Supreme Court, three lawyers of marked ability and former officers of the state, who have made careful investigation and study of grants made by Sonora—all testify that they have absolutely no doubt of the genuineness and legality of this grant. Mr. Forbes, the United States consul at Guaymas, who was for more than fifteen years translator of Spanish documents in the archives of the surveyor general of California, testifies that, in

his opinion, there is no doubt of the genuineness of the title papers in this case.

The expediente issued to Rodriguez is approved by Leonardo Escalante, the then governor of the state of Sonora; his son, the assistant secretary of state, testifies positively that his father's signature to the original paper is true and genuine.

Juan Jose Encinas certifies, on March 27, 1838, to the ability of Rodriguez to stock the land. His son testifies that the entire instrument was written by his father.

There are several certificates relating to the grant signed by Jose Maria Mendoza, as treasurer general of the state; his nephew, the prosecuting attorney, testifies that each of these signatures are the true and genuine signatures of Jose Maria Mendoza, and that one of the instruments written in 1841 is in his hand writing.

Governor Aguilar signs one of the instruments attached to the grant; his son, the treasurer general of the state, testifies that his father's signature thereto is genuine.

The secretary of state, probably the ablest man in the state, and one of its United States senators, testifies that he is personally acquainted with the signature of Mauricio Carrillo, who signs the title papers and proceedings in this case thirty-two different

times, and says that each of his signatures thereto is true and genuine; the same person testifies to the genuineness of the signatures of Governors Escalante, Pesquearia, and Aguilar.

The secretary of state has written a history of the governors of the state, and of its resources, and has devoted much of his time to the examination of the archives, and is entirely and thoroughly familiar with the same.

Other persons, in no wise connected with the offices of state, testify as to the genuineness of the signatures.

Judge Sanford was engaged for about four months in the examination of the archives of the state of Sonora, and investigated this title. He testifies that a large portion of the body of the testimonio and expediente, is in the hand writing of Jose Tamayo, who was, in the year 1838, a clerk in the office of the treasurer general of the state. A comparison of Tamayo's writing with the original papers, or with the photographic copies of the same, clearly shows that Judge Sanford is correct in his conclusion.

Mr. Aguilar, the present treasurer general of the state, and Mr. Rochin, the keeper of the archives, testify that the same hand writing as that of the body of the expediente and testimonio appears in many of the records of the treasurer general's office for the

year 1838. Mr. Aguilar also testifies that the seal attached to the title papers is the official seal of the treasurer general of the state of Sonora, used by that officer for the year 1838.

Juan A. Robinson testifies fully as to the genuineness of the title, and to the fact that he purchased the same in 1847.

The fact that the widow and children of Mr. Rodriguez, after his death, executed a deed to Mr. Robinson, corroborates him fully.

If this title is a fraud, when and by whom was the fraud committed? The answer must be, that the fraud was committed about the time of the cession of the land to the United States, and the motive for the commission of the fraud must have been to acquire land in this country, which was considered more valuable than land under the jurisdiction of the Mexican nation. This was the position formerly assumed by counsel for the United States. He now admits the genuineness of the signatures, but says there is a suspicion of ante-dating. The record and all the evidence negatives this suggestion, and a conclusive answer to it all is, that Governor Escalante, who approved the sale of this land to Rodriguez, in April, 1838, and whose signature to this approval is established beyond question as genuine, died in the city of San Francisco, in the spring of 1851, more than two

years before the United States negotiated for the Gadsen purchase.

Record, pages 105-106.

But if this title is spurious, why did these alleged forgers content themselves with taking but five square leagues of land, at the junction of the Colorado and Gila rivers? The testimony shows that there is as much more equally as good, adjacent to the land sold to Rodriguez, and within the United States. Why did they not take eleven square leagues of the land ceded to the United States?

Both Mr. Rodriguez and Mr. Robinson were men of the highest standing in their community; one for many years an officer of our own government; the other a merchant of means in the state of Sonora, and for years one of its trusted officers. If this grant is a fraud, they must have conspired with the officers of the state—not only the officers acting at the time of the issuance of the grant, but as well those occupying official positions, from the highest to the lowest, for many years after the title was issued. And for what was all this done? To obtain title to uninhabitable land on the frontier of the state, surrounded by hostile savages, which was entirely barren, and of but trifling value until reclaimed by the expenditure of large sums of money by this petitioner, in building irrigating ditches and making

other improvements so as to render it fit for cultivation.

We confidently submit that the court will conclude from an examination of all the facts and circumstances of this case, as testified to by the various witnesses (and all agree that each of the witnesses testifying for the petitioner are men of the very highest standing and intelligence in the state in which they reside) that the title papers of the Algodones grant are true and genuine.

Before discussing the laws of the Mexican nation, and those of the state of Sonora, we subjoin a brief history of the situation in Mexico, prior to the adoption of the constitutive act and the federal constitution, written by Mr. John H. Knaebel, an able lawyer and accomplished Spanish scholar.

> In 1821 the fierce struggle which had been raging in New Spain proper between the viceroy and the revolutionary generals came to a culmination, nearly all the provinces having before this time revolted. O'Donoju, the viceroy, was a constitutional monarchist, and owed his commission largely to the influence of the American members of the Spanish cortes. (3 "Mexico," 741.) Fearing that otherwise Spain might lose her Mexican possessions, he was willing to make peace on any terms consistent with the royal dignity. Iturbide, after serving the king for ten years in bloody and ruthless antagonism to the revolu-

tion, turned traitor, and beguiling Guerrero, who was in command of a revolutionary army, joined with that general in the formulation of the "Plan of Iguala," which was proclaimed by Iturbide on the twenty-fourth of February, 1821. (3 "Mexico," 675, 678.) Less than a fortnight before this date nearly all the deputies from New Spain were assembled at Vera Cruz, in order to take passage there for the mother country, where they were expected to attend the approaching cortes. Iturbide endeavored to persuade them to remain and open a congress under his new project of government, but very few consented, and nearly all sailed for Spain on the thirteenth of February. (3 "Mexico," 676.)

The Plan of Iguala (3 "Mexico," 678) was first proclaimed in a form more abbreviated than that in which it was sent by Iturbide to the viceroy, although not essentially different. Its articles embraced, among others, a declaration of the independence of New Spain, with further declarations to the effect that its government should be a moderate monarchy in substantial conformity to the Spanish constitution ("con arreglo a la constitucion peculiar y adaptable del reino"); that its emperor should be Ferdinand VII., but if he should fail to appear personally in Mexico and take the oath, then there should be invited in his place the infante Don Carlos, or Don Francisco de Paula, or the Archduke Carlos, or some other member of the reigning family deemed suitable by the congress contemplated by the

plan; that, until the meeting of the congress and in order to bring that about and to carry into effect the purposes of the plan, a "*Junta*" (assembly or board) to be called "*Gubernativa*" (governing) should be formed; that the junta should govern in the name of Ferdinand VII. until his arrival and qualification, but treat as suspended all royal orders which might be issued by him meanwhile; that the congress ("*las cortes*") should determine whether to continue the junta or substitute therefor a regency pending the arrival of the person to be crowned; that in case Ferdinand VII. should not consent to come to Mexico, the junta, or the substituted regency, should govern in the name of the nation, while the selection and coronation of the emperor should be pending; that the congress should establish the constitution of the Mexican Empire; that all inhabitants of New Spain should be citizens; that the person and property of every citizen should be protected by the government; that the junta should take care that all branches of the state should remain without any alteration whatever, and all functionaries—political, ecclesiastical, civil and military—just the same as they then were ("15. La Junta cuidara de que todos los ramos del Estado queden sin alteracion ninguna y todos los empleados politicos, eclesiasticos, civiles y militares, en el estado mismo en que existen en el dia"); that until the organization of the congress all criminal proceedings should be conducted in strict conformity with the Span-

ish constitution ("21. Interin las cortes se establecen, se procedera en los delitos con total arreglo a la constitucion espanola"); and that, since the congress about to be convened had to be constituent (*constituyente*), it was necessary for the deputies to receive adequate powers in that behalf, and, since it was very important that the electors should know that their representatives were to be for the congress of Mexico, and not that of Madrid, the junta should prescribe just rules for the elections and indicate the time for them, as well as for the opening of congress.

This plan did not contain a word suggestive of Iturbide's secret ambition to gain the crown. On the twenty-fourth of August, 1821, however, when Iturbide and the viceroy, O'Donoju, having come to terms mutually satisfactory, entered into the so-called Treaty of Cordova, on the basis of the Plan of Iguala, there appeared in the treaty a modification of the plan, by which Iturbide secretly and subtly prepared the way for reaching the throne, by providing that, in case Ferdinand VII. and other members of his family, specifically named in the treaty, should refuse the crown, or not be acceptable, then it should be conferred on whomever the congress of the empire might designate ("el que las cortes del Imperio designen"). While this treaty confirmed substantially the Plan of Iguala, it made some modifications. (3 "Mexico," 739, 740.) Among other changes, it styled the proposed junta "*Junta Provisional Gubernativa*," and altered its

personnel, and it provided that the junta should have a president who might or might not be one of its members; that the junta should issue a a manifesto to the public setting forth the purposes of its establishment and instructing the people regarding the proposed election of deputies to the congress; that, after the selection of its president, the junta should appoint a regency composed of three persons from within or without its own body; that the executive power should reside in the regency, and it should govern in the name of the monarch, "until he should grasp the sceptre of the empire;" that, meantime, the junta should govern in conformity with the *existing laws*, in everything not opposed to the Plan of Iguala, and during the formation of the constitution by the congress ("XII. Instalada la Junta provisional gubernara interinamente conforme a las leyes vigentes en todo lo que no se oponga al Plan de Iguala, y mientras las Cortes formen la constitucion del Estado"); that the regency should proceed to call the congress together according to the method determined by the junta, this being declared to be conformable to the spirit of article XXIV. of the said plan; and that the executive power should reside in the regency and the legislative in the congress; but that the junta, until the meeting of the congress, should exercise the legislative power in urgent cases, acting in accord with the regency, and also act as an auxiliary and consulting body for the latter.

Always stimulated by his kingly ambition, Iturbide, afterwards, nominated as "La *Junta provisional gubernativa*" thirty-eight favorites, all of whom were either noblemen or affiliated with the aristocracy (4 "Mexico," 11), although urged by a friend to invite the co-operation of the provincial deputations in fixing the personnel of the junta. (*Ib.*, 13.) Having organized and proclaimed the junta, on the twenty-eighth of September, 1821, with Iturbide as its president, he and the other members of that body signed and promulgated on that day the declaration of independence of the Mexican Empire ("Acta de Independencia del Imperio Mexicano"), which, in so many words, professed conformity with the principles laid down in the Plan of Iguala and the Treaty of Cordova. ("Con arreglo a las bases que en el Plan de Iguala y tratados de Cordoba establecio sabiamente el primer jefe del ejercito imperial de las tres garantias.") *Ib.*, page 17.

This declaration of independence, limited as was its scope, was received with favor in nearly all the provinces, although some dissented and insisted on maintaining their respective autonomies. Such is the ground on which it is not unusual to fix the date of Mexican "independence" as the twenty-eighth of September, 1821.

In pretended pursuance of the Plan of Iguala and the Treaty of Cordova, and under the "Acta de Independencia," based on those instruments, the junta proceeded to call a congress of deputies from the several provinces, as well as to make

provisional and arbitrary selection of persons to act in the place of absent deputies or in the name of provinces that might fail to hold elections, and it organized a regency with Iturbide at the head.

Some of the provincial elections of deputies were held according to the provisions of the Spanish constitution of 1820, and others according to the terms of the call of the junta and regency, but, notwithstanding these and other irregularities, the congress contemplated by the Plan of Iguala and the Treaty of Cordova convened and organized in the city of Mexico, on the 24th of February, 1822. (*Ib.*, pages 52, 53, 55.)

It was soon made manifest that this body, called to make a constitution, was, in spite of the stormy opposition of a large minority, many of whom were arbitrarily jailed by Iturbide, turned into his willing tool. It failed to propose a constitution, but it succeeded, by an illegal vote, in declaring Iturbide hereditary emperor of the "Mexican Empire." (4 "Mexico," 77.) Accordingly, he was crowned on the 21st of July, 1822. All this occasioned the express protest of several provinces, by their political chiefs, provincial deputations and ayuntamientos, as in the case of Nuevo Santander. (*Ib.*, 83.) For three months, Iturbide sought to overawe the congress, while that body resented his interference, and then, by his unlawful decree of the 31st of October, 1822, as

well as by force, he dissolved and dispersed it. (*Ib.*, 85.)

Thereupon, Iturbide, without any pretense of constitutional or statutory right, created a new junta, called *La Junta instituyente*, to take the place of the junta which had ceased to exist on the organization of the congress, and selected as its members two persons as deputies for each of some of the provinces and one as deputy for each of the others. (*Ib.*, 85.) In consequence of these tyrannical proceedings on the part of Iturbide, new disturbances arose in many of the provinces, and, on the 6th of December, 1822, General Santa Anna, who had abandoned Iturbide and, entering Vera Cruz, gained over its garrison, there formulated and proclaimed the "Plan of Vera Cruz," declaring, among other things, that citizens should enjoy their respective rights of persons and property in conformity with the [Spanish] constitution and the laws; that the governmental functionaries should continue in their offices and faculties. ("Los ramos del estado quederan sin variacion alguna, y todos los empleados politicos, civiles y militares se conservaran en sus empleos y destinos, menos los que se opongan al actual sistema, pues a estos con conocimiento de causa se las suspendera hasta la resolucion del congreso."); that civil and criminal causes should proceed according to the Spanish constitution and the existing laws and decrees promulgated up to the time of the audacious extinction of the congress ("En las causes

civiles y criminales procederan los jueces con arreglo a la constitution espanola, leyes y decretos vigentes expedidos hasta la temeraria extincion del congreso en todo aquello que no se oponga a la verdadera libertad de la patria"); that certain provisions proclaimed on the 2d inst., by Santa Anna, on consultation with the provisional deputation of Vera Cruz, should be observed; and that the provisions of the "Plan" should be without prejudice to the faculties of the sovereign congress ("las altas facultades del soberano congreso") in which the power to modify them was thereby expressly acknowledged. (4 "Mexico," 86, 87.)

Echavarri and the other imperial generals, engaged in the siege of Vera Cruz against Santa Anna, combined with him, on the 1st of February, 1823, in the formulation of still another government project—called the "Acta de Casa Mata"—wherein, among other things, it was declared that the sovereignty residing in the nation, the congress should be installed in the shortest possible time, upon the same basis first prescribed ("bajo las bases prescritas para las primeras"); that, since some of the deputies to the dissolved congress were, by reason of their liberal ideas and strength of character, worthy of public esteem, while others had lost the public confidence, the provinces should be at liberty to re-elect the former and to substitute more suitable persons in place of the latter; that, pending an understanding between the supreme govern-

ment and the army, the provincial deputation of Vera Cruz might exercise administrative faculties; and that the army should be stationed in the cities and wherever emergencies might require, support the congress in its deliberations, and not disband, except on the order of that body. (*Ib.*, 88, 89.)

This plan, with its formidable military support, and its acceptance in many provinces, finally compelled Iturbide to issue a decree on the 4th of March, 1823, recalling the deputies for the reconvention of the congress, and, in consequence, a *soi disant* session of that body opened on the 7th of the same month, although, owing to the absence of distrustful deputies, a legal quorum had not yet gathered. (*Ib.*, 90, 91.) Before this body, Iturbide tendered his abdication as emperor on the 20th of March, 1823, although by its terms he reserved the supreme authority with liberty to delegate its exercise to persons worthy of the confidence of the congress, until it should pass upon the abdication. Before making a final disposition of the question of abdication, the so-called congress undertook to appoint a provisional government called the "Poder Ejecutivo," composed of Bravo, Victoria and Negrete, of whom the first two were absent, their places being supplied temporarily by Michelena and Dominguez. On the 7th of April following, the congress declared, among other things, that the coronation of Iturbide was an act of violence and was null; that all resulting acts were il-

legal and subject to confirmation by the "existing government"—*actual gobierno:* that the supreme executive power should promote the speedy departure of Iturbide from the national territory; and that there never was any right to subject the Mexican nation to any law or treaty, except such right as lay in the nation itself, or its elected representatives, according to the public law of free nations; and, in consequence, the congress considered the Plan of Iguala and the Treaty of Cordova as non-existent, and that it remained absolutely at liberty to adopt that form of government which it should deem suitable. (*Ib.*, 93, 94.)

The recklessness and absurdity of these declarations are abundantly pointed out by Olavarria. (*Ib.*, 94, 95.) We thus find that a congress founded on the Plan of Iguala and the Treaty of Cordova, and elected for the express purpose of forming a constitutional monarchy accordingly, actually assumed to destroy the very foundations of its legal existence, and, by tyrannical usurpation, to reform the government on an entirely inconsistent theory. Such acts bear only a *de facto* character, and could not *per se* override the existing *de jure et de facto* legal establishments, laws, usages and customs of the provinces. It is evident that the executive government—"Poder Ejecutivo"—born of such usurpation, possessed no *de jure* authority whatever.

No wonder that temporary anarchy followed, and that many provinces,—*quasi*-autonomies,

with their political chiefs, provincial deputations, ayuntamientos and other official authorities—openly asserted themselves against the lawless proceedings of the alleged congress and "executive power." (*Ib.*, 98, 99.)

On the 21st of May, 1823, the "congress" decreed a call upon the provinces to elect deputies to a new constitutent congress, upon a plan of election which met with general favor among the people in the provinces, although some of the provinces still resisted all the measures emanating from the capital. (*Ib.*, 99.) This new scheme involved the formulation of proposed bases of government on which the new deputies were expected to act in the adoption of a federal constitution, and these bases, printed in circulars, were published among the electors. They embraced substantially the provisions which the new constituent congress, which convened on the 7th of November, 1823, adopted as the *Acta Constitutiva*. (*Ib.*, 99.)

The constituent congress thus called was, in effect, a constitutional convention. The provinces elected their deputies on the express understanding that all were on an equal footing, and that each, either by itself, or in combination with contiguous provinces, should become a "free sovereign and independent state." Sonora and Sinaloa were represented in the convention on this well understood plan. After the convention had been in session for upwards of two months, the "Acta Constitutiva," signed by the deputies

on the 31st of January, 1824, declared (in its sixth article) not only that the integral parts of the nation were "free, sovereign and independent states," but (in the seventh article) that among the "states at present comprising the federation" was "the internal state of the west, composed of the provinces of Sonora and Sinaloa." (1 *White*, 375.)

[In the foregoing summary of relevant events of the Mexican revolution, most of the references are made to Zarate's "La Guerra de la Independencia," which composes Tomo III. of the work, published at Mexico and Barcelona (under the editorship of the historian, Palacio), entitled "Mexico a Traves de Los Siglos," and to Olavarria y Ferrari's "Mexico Independiente," which composes Tomo IV. of that publication.]

It is admitted that either the supreme government of Mexico or the state of Sonora had a right to make the grant in question. The court below did not deem it necessary to decide as to which, the state or the nation, was seized with the title or vested with the power to make the grant, and observed: "Evidently, if the state of Sonora had an existence and owned the land, or was authorized to dispose of it, the proceedings of the officers resulting in the sale were sufficient to pass the title." "It is our opinion that if it be held that the Mexican nation alone could make the grant, the proceedings of the officers shown in

the evidence were sufficient to vest at least an equitable, if not a full legal title in Rodriguez against the nation." And the decree below was based on the theory that both the nation and the state parted with their title to the land. We insist that in this case the determination of the question of the right of the state to pass title to this land is not necessary to uphold the decree, for the reason that the evidence is clear that the sale was approved by the supreme government and made by its officers—the junta de almoneda (board of sale)—as well as by officers acting or claiming to act on behalf of the state government. Should the court, therefore, be of opinion that the grant was made by both governments, it will be unnecessary to pursue the subject further.

Did Sonora own her public lands, and did she have a right to dispose of them as directed by her legislature?

She asserted this ownership in her constitution and legislation.

Section 16, Article 293, Constitution of Sonóra and Sinaloa, 1825.

Laws of Sonora and Sinaloa, May 20, 1825, Reynolds, page 129.

Laws of Sonora, July 11, 1834.

Id., page 186.

And this declaration of ownership of its lands was never annulled, interfered with or questioned by the authorities of any constitutional government of Mexico, or by the executive or legislative departments of any government, or by any dictator claiming any right or authority prior to 1838. But to arrive at a proper understanding of this question, it becomes necessary to examine the constitutive act, the constitutions of the nation and the state, and the legislation of the supreme and state governments relating to public lands.

The constitutive act of the Mexican federation, adopted January 31, 1824, declares as follows:

> Article 5. "The nation adopts for the form of its government, a popular, representative and federal republic."
>
> Article 6. "Its integral parts are free, sovereign and independent states, in so far as regards exclusively its internal administration according to the rules laid down in this act and in the general constitution."
>
> Article 7. "The states at present comprising the federation are the following, viz.: Guanjuato, the internal state of the west, composed of the provinces of Sonora and Sinaloa," etc., etc.; "the Californias and the district of Colima will for the

present be territories of the federation, and directly subject to its supreme power."

White's Land Laws in California and Texas, 375.

The constitution of October 4, 1824, makes the following declaration:

Article 4. "The Mexican nation adopts for the form of its government a popular, representative and federal republic."

Article 5. "The constituent parts of the federation are the following states and territories, viz.: The states of Sonora and Sinaloa, etc., etc.; the territories of Lower California, Upper California, Colima and Santa Fe, De Nuevo Mexico."

White, 308.

Article 50. "The exclusive powers possessed by the general congress are the following, viz.:

Subdivision 30. "To grant laws and decrees for the interior administration of the territories."

Subdivision 31. "To dictate all laws and decrees which may conduce to accomplish the object spoken of in the 49th article, *without intermeddling with the interior administration of the states.*"

White, 393-95.

"Article 137. The following are the attributes of the Supreme Court:

"1. To take cognizance of the disputes that may arise between the different states of the union, whenever there arises litigation in relation to the same, requiring a formal decree, and that arising between a state and one or more of its inhabitants, or between individuals *in relation to lands under concession from different states*, without prejudice to the right of the parties to claim the concession from the party which granted it."

White, 405.

Article 161, Subdivision 8. "To send annually to each of the chambers of congress a circumstantial account of the receipts and expenditures of the treasuries in their respective districts, with the origin of each, the state of agriculture, commerce and manufactures, of the new modes of industry which may be usefully introduced and protected, as well as the population and the means of protecting and augmenting the same."

White, 409.

Article 165. "Congress alone has the right to interpret the constitution in doubtful cases."

Substantially the same provision as the latter is engrafted in the constitution of Sonora and Sinaloa, that state declaring in addition to the above: "The tribunals and courts of justice being authorized solely for applying the law, shall never interpret the same nor suspend their execution."

Constitution of Sonora and Sinaloa, 1825.

The constitution of the republic and the constitution of the state reserved the power to declare an act of the national congress or state legislature void for repugnance to the constitution, to the legislative departments of their respective governments.

It will not escape observation that neither in the constitutive act nor in the constitution are creative words used. It is not said that the provinces under the Spanish *regime*, and the short-lived empire, are hereby erected into states, or that they shall be states hereafter, or that the Mexican territory shall be divided into states. They *ARE* states, sovereign, free and independent. The language of the general constitutive congress of the Mexican nation is as explicit, positive and unqualified as that of the general congress of the United Staes of America, when it solemnly published and declared: "That these united colonies are, and of right ought to be, free and independent states."

When the troublous reign of Iturbide, inaugurated so short a time before, had come to its end, and the Mexican people were again confronted with the problem of government, what more natural than to turn to the "flourishing republic" of their northern neighbors, the United States of America, for a model?

An examination of the constitutive act and the federal constitution makes it apparent that in framing

their constitution, such was the intention of the Mexican people, and as near as different conditions would admit, base their government on the same great fundamental principles, with two classes of sovereignty. An *exterior* sovereignty, to treat as a nation with other nations, and an *interior* sovereignty for each state to govern itself, free and independent of the others, and also independent of the federal government in all matters relating to the internal affairs of the state. Each of these sovereign powers, within their respective spheres, was independent of the other.

The address of the general constituent congress to the Mexican people, explaining and urging the adoption of the constitution, makes this purpose apparent. Among other things this address says:

> "The division of the states, the installation of its respective legislatures, and the construction of a multitude of establishments which have arisen in the short period of eleven months, furnishes evidence that congress has fulfilled, in a great degree, the hopes of the people, without pretending on this account to attribute to itself all the glory of such prosperous principles, and still less the original invention of the institutions which it has dictated. It had fortunately to do with a people obedient to the voice of duty, and *a model to imitate*, in the flourishing republic of our neighbors to the north. * * *."

"What relations of convenience or uniformity could possibly exist between the burning soil of Vera Cruz and the frozen mountains of New Mexico? How could the same institutions govern the inhabitants of California and Sonora, and those of Yucatan and Tamaulipas? * * * The inhabitants of Tamaulipas and Coahuila will reduce their code to a hundred articles, while the inhabitants of Mexico and Jaslisco will be on a level with the great nations which have advanced in the career of social order. These are the advantages of the federal system. *It gives each people the right of selecting for itself laws analogous to its customs, locality and other circumstances; to dedicate itself without impediment to the creation and improvement of those branches of industry which it may deem best calculated to promote its prosperity. * * * To you, therefore, legislators of the states, it belongs to develop the system of our fundamental law*, the corner stone of which is the exercise of public and private virtue."

White, 380.

No stronger declaration of the intention of the founders of the nation to leave to the people of the several states the government and control of their internal affairs could possibly have been made, than that contained in this patriotic address.

The authors of this appeal to the people of Mexico well understood that in imitating the government of the United States, with which their own people were

familiar, the new government would receive the earnest co-operation of a liberty-loving people, anxious for self-government.

The states formed the general government; the general government did not create the states. The constitutive act was the act of the "Federation." The constitution was the "*Federal Constitution of the United Mexican States.*"

The word "Federation" imports a treaty, a compact or agreement between two or more nations, states or parties. The constitution declares the nation to be one of a federation, and that the constituent parts of the federation are the following states and territories, naming Sonora, among others.

The following, from President Polk, in 1846, fully sustains the views here presented:

> "In the year 1824, Mexico established a federal constitution, under which the Mexican republic was composed of a number of sovereign states, confederated together in a federal union similar to our own. Each of these states had its own executive, legislature and judiciary, and for all except federal purposes, was as independent of the general government, and that of other states, as is Pennsylvania or Virginia under our constitution. Texas and Coahuila united and formed one of these Mexican states. The state constitution which they adopted, and which was approved by the Mexican confederacy, asserted that

they were 'free and independent of the other Mexican united states, and of every other power and dominion whatsoever;' and proclaimed the great principle of human liberty, that the 'sovereignty of a state resides, originally and essentially, in the general mass of the individuals who compose it.' To the government under this constitution, as well as to that under the federal constitution, the people of Texas owed allegiance.

"Emigrants from foreign countries, including the United States, were invited by the colonization laws of the state and of the federal government, to settle in Texas. Advantageous terms were offered to induce them to leave their own country and become Mexican citizens. This invitation was accepted by many of our citizens, in the full faith that in their new home they would be governed by laws enacted by representatives elected by themselves, and that their lives, liberty and property would be protected by constitutional guaranties similar to those which existed in the republic they had left. Under a government thus organized they continued until the year 1835, when a military revolution broke out in the city of Mexico, which entirely subverted the federal and state constitutions, and placed a military dictator at the head of the government.

"By a sweeping decree of a congress subservient to the will of the dictator, the several state constitutions were abolished, and the states

> themselves converted into mere departments of the central government. The people of Texas were unwilling to submit to this usurpation. Resistance to such tyranny became a high duty. Texas was fully absolved from any allegiance to the central government of Mexico from the moment that government had abolished her state constitution and in its place substituted an arbitrary and despotic central government."
>
> President Polk's Second Annual Message, December 8, 1846.

So we might well contend that, under such a system, confessedly modeled after that of their neighbors to the north, the fee of public lands within the borders of a state remained in that state, in the absence of any act of relinquishment to the general government by the state; as, in our own country, the thirteen colonies, afterwards the thirteen states of the federal union, notwithstanding the union retained the ownership in fee of their public lands.

I understand that there is authority against this theory of the organization of the Mexican government, the principle of which is the language of Mr. Justice Hemphill in Texas vs. Thorne, 3 Texas, 499, quoted at pages 61, 62 of brief for the government. Attention is called to this case, and it will be noted that Justice Hemphill did not consider the independent character of the provinces as they existed from

the date of the separation from Spain until the adoption of the constitution in 1824. He says, at page 505: "It will not be material, however, to prosecute an inquiry into the rights which might perhaps be claimed for a state on the ground of its constituting an integral part of the government existing previous to the confederacy." The value of Justice Hemphill's observations is largely destroyed by the further statement made by him, page 505: "Nor did she (Texas) evince, until a late period of her existence, if ever, that she claimed any right or control over the public lands, except such as was conceded to her by virtue of the national law (August 18, 1824) to which we have referred." This statement is so unquestionably at variance with the facts as to impress one that he had not given these questions careful or full consideration.

From the very moment of her existence, Coahuila and Texas asserted the right to the vacant lands within her borders.

Article XV. of the constitution of Coahuila and Texas, asserts that, "All kinds of vacant property within its limits, and all intestate property without legal successor, shall belong to the state."

And article XCVII. provided that congress had the power to "Enact what is proper for the administra-

tion, preservation and alienation of the property of the state."

Speaking of these two articles, at page 527, in Chambers vs. Fisk, 22 Texas, the Supreme Court of that state say: "Here is an open, express claim of right to the vacant domain in the state, with full power of disposition."

It seems to me important to remember that at least from the time of the so-called declaration of independence—September, 1821—the provinces were independent of any supreme authority, and their autonomy was recognized in the constitutive act and in the constitution. They clearly did not owe allegiance to the kingly pretentions of Iturbide or to any government which he claimed to have organized, nor did they acquiesce or submit to any form or plan of government other than the one of the constitution of 1824. So far as the relations of existing governments to the provinces were concerned before this date, they had not even the legal status of the powerful, to which the weak must give allegiance.

But, if we be wrong in contending for the autonomy of the provinces before the adoption of the constitutive act, and it be considered that the states had no existence prior to this act, then by force of its provisions, and before the adoption of the constitution of the nation, the states thereby created and named

thereafterward bore the same relation to the general government as if they had been free and independent states prior to the adoption of the constitutive act.

It becomes important, therefore, to examine the situation in the United States in regard to the relative rights of the federal government, and those of the several states, relating to the public lands.

At an early period of the war of the revolution, the question, whether the vacant lands within the boundaries of particular states, belonged to them exclusively, or became the joint property of all the states, was a momentous one, and threatened the existence of the confederacy. This question was compromised. It was settled by concessions and the adoption of the articles of confederacy.

In *Fletcher vs. Peck*, 6 Cranch, page 142, Chief Justice Marshall said:

> "The question whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question, which at one time threatened to shake the American confederacy to its foundations. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed."

To such lands as belonged to the respective colonial governments, the respective states which succeeded to the different colonies became entitled

and acquired the power to dispose of them as they might provide by local laws.

3 Washburn on Real Property, 164-165.
Johnson vs. McIntosh, 8 Wheat., 543.
Martin vs. Waddell, 16 Peters, 367.
Worcester vs. Georgia, 6 Peters, 544.
Tenett vs. Taylor, 9 Cranch, 50.

The states which possessed lands by virtue of original ownership are the thirteen colonies and Texas. In these states, lands not held as the private property of individuals, or *ceded by the state to the general government*, belong to the state within which they lie.

Kagama vs. United States, 118 U. S., 228.

The contention concerning ownership of public lands delayed the adoption of the articles of the confederacy from November, 1777, until March, 1781. In 1780, congress, finding the controversy could not be otherwise terminated, recommended that the states make liberal concessions. Virginia and New York agreeing to this, the articles of confederacy were signed, and cessions of territory made by each of the states in a manner satisfactory to all.

It must be evident that Mexico, in imitating our government and adopting it as a model, was familiar

with our history, our legislation, and the decisions of our courts.

Article III., section 2, of our own constitution, provides that the judicial power shall extend to all cases "between citizens of the same state *claiming lands under grants of different states.*" This was necessary, as the states owned the fee in the public lands within their respective limits.

A like provision is found in the Mexican constitution, quoted, *supra*, White, 405, wherein it is provided that the Supreme Court of the Mexican nation shall take cognizance of disputes which may arise "*between individuals in relation to lands under sessions from the different states.*" It would not seem possible that any other construction could be placed upon this language *than that the states had lands to grant:* otherwise, there would have been no concessions to be adjudicated. If such is not a proper construction of this language, then that part of the constitution is wholly meaningless. This court will not say that the framers of that instrument were using idle words. It is a statement by implication, that the public lands belong to the states. What is implied in a statute is as much a part of it as what is expressed.

Wilson Co. vs. Third National Bank of Nashville, 103 U. S., 770.

Gelpeck vs. Dubuque, 1 Wall., 222.

In Ex Parte Yarborough, 110 U. S., 651, this court said:

> "In construing the constitution of the United States, what is *implied* is as much a part of the instrument as what is *expressed*."

See, also:

> Rhode Island vs. Massachusetts, 12 Pet., 657.

In the Mexican constitution of 1824, there were certain articles prohibiting the states from doing certain enumerated acts, but nowhere therein is there any prohibition against the states making grants of public lands.

The fact is, that none of the constitutions or "plans" of government contained any provision surrendering the rights of the states to the public lands to the federal government, until the constitution of February 5, 1857, which is now in force. Under paragraph 3, sub-title "Of the Powers of Congress," article LXXII. of that instrument, we find the following: "Congress has the power * * * 24. To fix the rules to which the occupation and alienation of public lands ought to be subject, and the price of said lands."

> Hall, page 102.

And under title 6, "General Provisions," we find the following as article CXVII.: "The powers that

are not expressly granted by this constitution to the federal functionaries, are understood as reserved to the states."

Idem, page 109.

While this is not the exact phraseology of either the constitution of 1824 or 1826, yet each of these instruments contain certain prohibitory powers; but neither of them prohibited the states from granting their public lands, nor did they provide for the federal government to do so. If the states were not the owners of the public land within their respective demarcations prior to the adoption of the constitution of 1857, why did the framers of that instrument deem it necessary to authorize congress to fix the rules for their occupation and alienation, and the price to be paid therefor? If the nation was the owner of these lands, this provision would not be found in the organic law of 1857. If the ownership in the nation to these lands before that time had been recognized and understood, the congress of the nation would certainly have had ample power and authority to dispose of them without direct constitutional authorization, and a grant of power from the states to the federal government would have been unnecessary.

It should be kept in mind that the congress of the nation had the constitutional right to annul the de-

crees or laws of any of the states of the republic. This right it sometimes exercised, and at one time declared null one of the laws of the legislature of Sonora—law of May 6, 1850—relating to the colonization of public lands within the boundary limits, for the reason, as stated in the decree nullifying this law: "Because it is opposed to article XI. of the act of reforms, which says: 'It is the exclusive right of the general congress to establish bases for colonization, and to enact laws under which the powers of the union are to perform their constitutional functions.' And to article II. of the general law, promulgated April 25, 1835, which says:

> "'Article 2. In the exercise of the power reserved to the general congress, in article VII. of said law, of August 18, 1824, the frontier and littoral states are prohibited from alienating their vacant lands for colonization, until the regulations to be observed in carrying it out are established.'"

Compiled Laws of Mexico, May 14, 1851.

This colonization law of Sonora—May 6, 1850—annulled by the Mexican congress, was the first law that Sonora passed on the subject of colonization. The decree of the Mexican congress annulling this act of the legislature of Sonora is printed in the work of Mr. Reynolds' Spanish and Mexican Land Laws,

page 296, under a manifestly misleading heading. There is no pretense that this law was declared unconstitutional on account of a declaration of ownership by Sonora, of her public lands. It was the manner of their colonization against which the general government was decreeing.

The Mexican congress, in annulling this colonization law of Sonora, and the one of Coahuila and Texas *infra*, was asserting a right which it conceived to pertain exclusively to the *nation*; that is, the national authority reserved to itself the right of determining when and how lands along the coast and frontier should be colonized, deeming prudent regulations on this subject necessary for the peace and safety of the nation.

> "But while a judicious policy might forbid the settlement of large bodies of foreigners on the boundaries and sea coast, we cannot impute to them (the supreme government of Mexico) the weakness or folly of confining their native citizens to the interior, and thus leave their sea coast a wilderness without population. On the contrary, the same considerations of policy which excluded foreigners, would encourage the settlement of natives within those bounds. The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers."
>
> Arguelo vs. United States, 18 How., 539.

"There were portions of the general colonization law (referring to the law of August 18, 1824) which did relate to matters pertaining particularly to the federation, as the colonization of the littoral leagues, the introduction and naturalization of foreigners, payment of army, etc., as recognized by both the state and federal governments."

Chambers vs. Fisk, 22 Texas, 504.

"The consent of the federal executive of Mexico to the grant of a native Mexican of land within the border or littoral leagues was never necessary, but that such consent was only necessary to a grant to a foreigner, or to a contract to colonize, whether the contractor was a foreigner or a Mexican."

Wilcox vs. Chambers, 26 Texas, 123.

And the national congress also annulled the laws of the legislature of Coahuila and Texas, relating to colonization, for the reason as stated in its decree:

"Article 1. The decree of the legislature of Coahuila and Texas, of March 14 of the present year, is, in its articles 1 and 2, contrary to the law of August 18, 1824; consequently the alienations made by virtue of said decree are null and of no value.

"2. In the exercise of the powers the general government reserved to itself, in article 7 of said law of August 18, 1824, the border and littoral

states are prohibited from alienating their public lands for colonization thereon, until the rules they shall observe in doing so are established.

"3. If any of them desire to alienate any part of their public lands, they shall not have the power to do so without the approval of the general government, which, in every case, shall be preferred if it sees fit to take them, *and shall give the states the proper indemnity.*

"4. The general government can, under articles 3 and 4 of the law of April 6, 1830, by virtue of its preference right, purchase of the state of Coahuila and Texas the four hundred sitios it says it is under the necessity of selling."

Compiled Laws, April 25, 1825, volume 3, page 42.

The law of August 18, 1824, was a colonization act, and has been so declared by different decisions of this court. Arguello vs. U. S., 18 How., 539; Wilcox vs. Chambers, 26 Texas, 183. And it was against a violation of these colonization acts that the national legislation was directed in annulling the decrees of the states named.

The fourth article of the foregoing decree clearly recognizes the right of the state of Coahuila and Texas to her vacant lands and says the nation may purchase them in accordance with the law of the national congress of April 6, 1830, sections 3 and 4,

which law contains an explicit declaration that the states owned their public lands.

> "Article 3. The government shall appoint one or more commissioners, whose duty it shall be to visit the colonies of the frontier states, to contract with the legislatures of said states for the purchase by the nation of lands suitable for the establishment of new colonies of Mexicans and foreigners. * * *.
>
> "Article 4. The executive is empowered to take possession of such lands as may be suitable for fortifications and arsenals, and for the new colonies, *indemnifying the state in which such lands are situate*, by a deduction from the debt due by such state to the federation."

Rockwell, 621.

Reynolds, page 148.

Compiled Mexican Laws, volume 2, page 238, No. 809.

Mr. Reynolds is in error in saying (Reynolds, page 34) that the decree of April 23, 1835, prohibits the frontier littoral states from "selling the vacant lands within their boundaries, without the previous approval of the general government. The decree states that "the border and littoral states are prohibited from alienating their public lands for *colonization* thereon" until the rules they shall observe in so doing are established.

Counsel for the United States mentions this law (brief, page 72), and says: "This is an evident attempt to peacefully withdraw from the states, not the ownership of the lands, but the right to pass laws regulating colonization under the law of August 18, 1824." We fail to comprehend what or where counsel discovers anything either in the law itself or in the history or legislation of that period to warrant this new and startling proposition. We can scarcely read the history of those times and believe that Mexico was so "peacefully" dealing with the states concerning a matter of such supreme importance as one from which the greatest public revenue might be derived, and we cannot believe that she would conceive it to be her duty to pass a law of the national congress recognizing the rights of the states to do that which she wished them not to do.

Of this law of April 6, 1830, the Supreme Court of Texas says: "It contains a plain and unequivocal recognition of the full right of the state to the vacant domain in her limits, and of its right to dispose of it."

Chambers vs. Fisk, 22 Texas, at page 529.

"The obnoxious article of the law of the 6th of April, 1830, prohibiting the ingress of foreigners

from bordering nations was repealed on the 21st of November, 1833."

> The Republic vs. Thorn, 3d Texas, at page 507 (citing Colln. Decretos, 33, 34, 35, page 74.)

We do not find the decree repealing this section in Reynolds' compilation. I am, however, advised that the repaling act in no manner affects sections 3 and 4, quoted *supra*.

And when it is considered how jealous of its power (particularly in matters affecting its public revenue) the general government of Mexico always was, might we not, if the officials of the state of Sonora, in authorizing and making sale of vacant lands, usurped powers, reasonably expect to find some law or decree disproving and annulling their acts? There is no law of the general government annulling the acts of Sonora during the time she was making these grants, or even questioning the validity of her transactions or legislation on the subject.

On the 20th of May, 1825, the congress of the state of Sonora and Sinaloa passed a law providing for the sale of the vacant lands of the state, and at the time of the adoption of the constitution of Sonora and Sinaloa, in November, 1825, a declaration of ownership of these public lands was expressly embodied in that instrument.

The legislature of Sonora and Sinaloa petitioned the national congress to divide the territory of that state into two states, which was done by national enactment, October 13, 1830.

Compiled Laws, Mexico, volume 2, page 231.

On the 10th day of June, 1833, Sonora passed a law granting extension of time for perfecting titles to land granted by that state, which law was followed by another of December 30, 1834, again extending the time for this purpose, and thereafter the law of the original state of Sonora and Sinaloa was enlarged by the congress of Sonora, on the 11th day of July, 1834, by the enactment of the law known as the "*Organic Law of the Treasury*," in which provision was made for the sale of the vacant lands of the state for the benefit of the state treasury. By the former enactment the state of Sonora and Sinaloa, and by the latter, the state of Sonora assumed the right to dispose of her public lands for the benefit of the state treasury, and for many years acted under them, sold her lands, and received the price into her own treasury without interference or protest on the part of the general government.

The government could not have been ignorant of the fact that the states were raising money in this

way, because every year it was reported to the chamber of the national congress.

Article CLXI., subdivision 8, national constitution, 1824, reads:

> "To send annually to each of the chambers of congress a circumstantial account of the receipts and expenditures of the treasuries in their respective districts, with the origin of each, the state of agriculture, commerce and manufactures, of the new modes of industry which may be usefully introduced and protected, as well as the population and the means of protecting and augmenting the same."
>
> White, 409.

Subdivision IX. of the same article is as follows:

> "To forward to the chambers and in the recess to the council of government and the executive power, a copy of their constitution and laws."

On the 26th day of March, 1826, the Mexican congress passed a law requiring the "commissaries general" to transmit to the general government a collection of all the decrees, orders and regulations passed by the congress of each state.

(2 Galvan's Nueva Collection, page 634.)

Now then, was it possible for the general government to have been ignorant of the constitution and

laws of Sonora and of the fact that she was disposing of her public lands?

The following language, used by Mr. Chief Justice Chase in speaking of a law of the territory of Utah, well applies here:

> "In the first place, we observe that the law has received the implied sanction of congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws on or before the first of the next December in each year. The simple disapproval by congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."
>
> Clinton vs. Englebrecht et al, 13 Wall, 434-49.

We believe then that it is fair to say that these laws of the state and the manner of their execution were well known to the Mexican national congress, executive and other officials. They were not disapproved; other laws were, and the law will presume that these acts were acquiesced in and approved.

> "No court in the universe, which professed to be governed by principle, would, we presume, undertake to say that the courts of Great Britain

> or France, or any other nation, had misunderstood their own statutes, and, therefore, erect itself into a tribunal to correct such misunderstandings."
>
> Chief Justice Marshall in Elmendorf vs. Taylor, 10 Wheat., 152.

Within a few months of the change of government in 1836, and the legislation leading up to this new system, we find the congress of the nation providing for the payment of $1,000,000, granted to Augustin Iturbide by the provisional council of government, in 1822, as a reward for the sublime distinction he obtained by securing the independence of his country, and also providing that the twenty square leagues of land referred to in the decree of 1822, "which he desired in Texas, shall be given to his administrator and heirs, in the territories of New Mexico or Upper California, or Lower California, if it cannot be done in Texas, in such manner as the government may agree upon with those interested."

> Compiled Laws, volume 3, page 41, April 18, 1835; Reynolds, page 192.

If the government was the owner of these lands, why should there have been any doubt about its ability to give lands in Texas, in accordance with the desire of the emperor? Was it not because the gov-

ernment understood that it would have to arrange with the state authorities of Texas before this large tract of land could be given to the heirs of the late emperor, and fearful of its ability to make a satisfactory arrangement with the state government, provision was made for the selection of these lands in the *territories* of the republic, where the nation had a clear right to grant them?

It will not do to answer these suggestions by saying that during Santa Anna's reign, and in 1853, it was decreed by him that this obligation was to be in part satisfied by taking lands from either Lower California or Sonora, for it will be admitted by appellee that Santa Anna asserted the right to take the property of *all* persons, whenever it best suited "His Most Serene Highness" to do so.

On the 30th day of August, 1849, we find in the compiled laws of Mexico an executive order or law, addressed to the governor of Sonora, again recognizing the right of the states to the public lands, as follows:

> "The supreme government is advised that upon account of the disturbances existing in Upper California, especially in the gold fields, the odium thereof being cast upon the Mexicans, Spaniards and Chilians, which interferes with their residing there and forcing them to remove. In addition to other advices which indicate that in that

country there are no social guarantees, this has attracted the attention, doubtless, of his excellency, and in consequence, he orders me to say to your excellency, that he expects you to do what is possible to bring us this population, with the idea that these emigrants will be given public lands upon credit, and if this state will not grant the same gratuitously to the emigrants who cannot pay, the same will be provided them notwithstanding, for the general government obligates itself to indemnify the state therefor, in the manner which the general congress may determine."

Compiled Laws, volume 5, page 603, No. 3321. Reynolds, page 294.

Upon the question under discussion, and the division of the rights and powers between the government of Mexico and the states forming the national government, the case of Chambers vs. Fisk, 22 Texas, 504, *supra*, because of the manifest familiarity of the court with the matters therein considered, as well as the inherent strength of the opinion, is entitled to the highest respect. After referring to the provisions of the constitutive act, and of the constitution, most of which are herein given, the court, at page 522, say:

"Under the rights thus accorded, the congress of Coahuila and Texas established a provisional state government at Saltillo, August 15, 1824, and afterwards adopted a constitution of the

> state of Coahuila and Texas, on the 11th of March, 1827, in which, after asserting the freedom and independence of the state, it is declared, that: (Article 4) In all subjects relating to the Mexican confederacy, the state delegates its powers and rights to the general congress of the same; but in all that belongs to the internal government and administration of said state, it retains its liberty, independence and sovereignty."
>
> "The instrument proceeds to institute and organize the respective departments of a representative republican state government; asserts that 'all kinds of vacant lands within its limits, and all intestate property without legal successor, shall belong to the state,' and declares that its 'congress shall have power to enact, interpret, amend or repeal the laws relative to the administration and internal government of the state, in all its branches.'"

And then, after directing attention to the differences between the constitution of the United States of America and that of the Mexican states particularly, referring to the power and practice of the general congress of Mexico to annul unconstitutional measures, that power not belonging to the courts, the court, at page 527, say:

> "These views, it is believed, will enable us the better to consider the Mexican system of government, as to its powers, duties and obligations in all its departments, in a point of view from which

the Mexicans who framed it, and acted under it, did regard it. And that is important; for *that* is the actual government, which they (and not others) understood themselves to be founding and carrying into operation."

"The fact, then, that a constitutional provision, or a law or class of laws, was subjected to these ordeals of supervision and abrogation, and was suffered to remain in force long enough for rights to be acquired under it, is a strong and potent circumstance in favor of its validity, as a part of their system of government, as they understood it."

"The general government, in recognizing the state of Coahuila and Texas as organized under its constitution, conceded the right of internal administration, as effectually as though the states had been free and independent sovereignties, and had, by joint concessions and agreements, formed the federal government."

"The constitution of that state, after asserting its independent sovereignty, except as to the powers delegated to the general government, assumes to claim that 'all kinds of vacant property within its limits, and all intestate property without a legal successor, shall belong to the state' (article 15); and that the congress of the state shall have power to 'enact what is proper for the administration, preservation and alienation of the property of the state' (article 97). Here is an open, express claim of right to the vacant domain in the state, with full power of

disposition. These provisions of the constitution of the state are not annulled or controverted in any way by the general government."

The reasoning of the Supreme Court of Texas, as before indicated, applies as well to the state of Sonora.

We were told at the bar in oral argument, at the trial in the court below, that the declaration of ownership of the public lands by the state of Coahuila and Texas could not be taken as a precedent, for the reason that that state was always in rebellion against the national government, and that no doubt the declaration concerning vacant lands, found in the legislation and constitution of the state of Sonora and Sinaloa, was taken from the same declaration in the laws and constitution of the state of Coahuila and Texas. It will, however, be noted that the constitution of Sonora and Sinaloa was adopted by that state November 2, 1825, and that the constitution of the state of Coahuila and Texas was not adopted until the 11th of March, 1827, nearly a year and a half after the adopting and promulgation of the constitution of the state of Sonora and Sinaloa, and nearly two years after the enactment of the law of May 20, 1825, by the congress of Sonora and Sinaloa, providing for the sale of vacant lands in the state. And is it not then fair to presume, as did the Supreme Court of the state of Texas, that if it had been considered,

on the part of the federal government, that these acts of the state of Sonora were an unconstitutional encroachment upon the prerogatives of the federal government, the federal congress would, as it had the right to do in such case had the state of Sonora exceeded her powers, have promptly interfered and annulled legislation and grants of lands, in pursuance thereto? In so important a matter as the sale of public lands, the exercise of a power unwarranted by the constitution would have been promptly suppressed by the general congress.

On August 4, 1824, and between the dates of the constitutive act and the adoption of the constitution, the general congress of Mexico passed a decree specifying the sources of federal revenue. The 11th article of this decree declares "that the rents (revenues) that are not included in the preceding articles of this decree belong to the states." As nothing is said in the former articles of the decree concerning the revenue to be derived from the sale of the public lands, it must have intended to declare that such revenue belonged to the states. This construction was claimed for it by the state of Sonora, and was never disputed by the general congress.

On November 25, 1853, Santa Anna promulgated a decree to the effect that the public lands were the exclusive property of the nation—never could have

been alienated by the states of the republic; and declaring that all sales of the public lands, which had been made without express mandate and sanction of the general government, were annulled, which was followed on July 7, 1854, by another decree from the same authority, declaring that titles issued after the year 1821 should be submitted to the review of the supreme government, and without it they could have no value.

Hall's Mexican Law, 166-7.

Compiled Laws, volume 6, page 776, No. 4118.

Id., volume 7, page 222, No. 4276.

Of these decrees we will, in discussing another branch of this case, have more to say later on.

On December 3, 1855, President Alvarez annulled both of these decrees by his decree of that day, articles I., II. and III. of which are as follows:

"Article 1. The decrees of November 25, 1853, and July 7, 1854, which submitted to the revision and approval of the supreme government the grants or alienations of public lands made by the local governments of the states or departments and territories of the republic from September, 1821, to that date, are repealed in all their parts.

"2. Consequently, all the titles issued during that period by the superior authorities of the

states or territories under the federal system, by virtue of their lawful faculties, or by those of the departments or territories, under the central system, with express authorization or consent of the supreme government for the acquisition of said lands, all in conformity with the existing laws for the grant or alienation respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the government.

"3. The alienation of public lands that have been made by the authorities of the state or departments and territories without the requisites referred to in the preceding article, and in contravention of the provisions of article IV. of the law enacted by the general congress, on the 18th of August, 1824, are void and of no value, and the holders of that class of lands are subject to the penalties established by existing laws in the republic for those who acquire property in an unlawful and fraudulent manner, unless they promptly obtain the approval of the supreme government, to which they shall apply therefor through the department of public works."

Compiled Laws, volume 5, page 627, No. 4588.

On October 16, 1856, the congress of the nation passed a decree as follows:

"Article 1. The decrees of November 25, 1853, and July 7, 1854, are void.

"2. Antonio Lopez de Santa Anna and the ministers who took part in their approval and promulgation are responsible, with their property, for the damages they have caused.

"3. The governors of the departments are likewise responsible, with their property, for the damage they have caused in the execution of the provision on public lands, having exceeded the limits laid down in the several laws."

Compiled Laws, volume 8, page 269, No. 4811.

Hall, 169.

Had the federal government not been of the opinion that the alienations against which the decrees of Santa Anna were directed were valid, the law of October 16, 1856, would certainly not have been passed. These decrees are not *repealed*—they are declared *null*.

The Mexican nation having conceded these titles, by this act of 1856, to be valid under the laws of Mexico, the government of the United Staes certainly should not question their validity.

This law of October 16, 1856, is a direct and positive statement on the part of the supreme federal authorities that the states had been, from the year

1821, the owners of their respective vacant lands, and in the disposal of the same, by sale or otherwise, had lawfully exercised the power of sovereign states.

In 1892, one of the counsel for appellee (Mr. Hall) addressed a letter to the Hon. Ignacio L. Vallatra, who was for many years chief justice of the Supreme Court of Mexico, and for a long time after he resigned that position, the chief legal advisor of the government, as well as a law writer of great learning and ability, touching the power of the several states of Mexico to dispose of the public lands, and on the 3d of May, 1892, Judge Vallatra replied to the letter as follows:

> "You are right in believing that while the constitution of 1824 governed the country, the states legally disposed of the vacant lands; and although the administration of General Santa Anna, centralizing the power, nullified the concessions of land by the states, the constituent congress annulled the laws of Santa Anna, by its decree of the 16th of October, 1856, which *considered valid those concessions.* The constitution, which governs to-day the republic, of the 5th of February, 1857, gives the federal power the right to dictate rules to which the alienation of the vacant lands ought to be subject; and the law in force on the matter of July 22, 1863, gives the state in which the vacant land is situated a third part of the price; but neither it nor the

> constitution says expressly whether the property in such land is of the federation or of the state. Upon this point exists divers opinions, but in fact, the federal power is the one that disposes of those lands."

In 1887, the Mexican secretary of public works issued an "exposition of the colonization of the republic," in reference to the act of Don Francisco Madira, who, while acting as an officer of the state of Coahuila, founded the town called "Libertad," in about the year 1836. The secretary says: "It is to be observed that in that time the *states had the power to make concessions of lands, issue titles, and dictate the proper conditions on the subject of colonization.*"

We have also in this case the testimony of two Mexican lawyers of great eminence and ability, both of whom have held the highest judicial positions in their own country, and we believe that an examination of their testimony will convince the court that it is entitled to the highest consideration.

Mr. Castaneda testified in part as follows:

> "I have held judicial positions—Supreme Court justice of the nation, judge of the first instance in the criminal branch of Durango and Hermosilla, president of the Supreme Court, justice of Flascata, fourth judge of the criminal branch in the capital of the republic, prosecuting attorney for the Supreme Court of Mexico, and

> president of one of the halls of appeal of the same tribunal, and the president of the Supreme court and justice of the state of *Sonora*. The state of Sonora had ample legal power and authority to dispose of its public lands in the manner provided by its own laws."

Mr. Castaneda then gives his reasons for the statement above made, and cites the constitution and the laws authorizing such action on the part of the state.

He concludes his testimony in answering a question by one of the justices of the court below as follows:

> "Q. Had the state the authority to absolutely alienate its lands without the consent of the federal government? A. It had."

Record, pages 111, 112, 113, 114, and 115.

Mr. Robinson testified that he had been a member of congress, judge of the first instance, judge of the Supreme Court of the state of Sonora, and federal district judge. He gives a detailed history of the manner of making grants, and says there is no doubt of the right of the state to make the grant in question.

Record, pages 95 to 106.

We earnestly invite the attention of the court to the testimony of these two judges, and it would seem that great weight should be given to the testimony

of these state officials and lawyers as to the construction placed upon the laws of their state and the manner in which such laws were executed.

In seeking for information and sources of authority in foreign countries where there are no reported decisions, Chief Justice Taney, in speaking for this court, said:

> "It is proper to remark that the laws of these territories (Mexican) under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them as much so as the laws of the state of the union. In doing this, however, it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of the statute, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources—such as the records of official acts—and the practice of the different tribunals and public authorities, and it may sometimes be necessary to seek information from individuals whose official position or pursuits have

given them opportunities of acquiring knowledge."

Fremont vs. United States, 17 Howard, 541.

"There is another source of law in all governments—usage, custom—which is always presumed to have been adopted with the consent of those who may be affected by it. In England and in the states of this Union which have no written constitution it is the supreme law, always deemed to have had its origin in an act of a state legislature of competent power to make it valid and binding, or an act of parliament, which, representing all the inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. 2 Co. Inst., 58; Wills, 116. So it is considered in the states and by this court. 3 Dall., 400; 2 Pet., 656, 667.

"A general custom is a general law and forms the law of a contract on the subject matter. Though at variance with its terms, it enters into and controls its stipulations as an act of parliament or state legislature. * * * The court not only may, but are bound to notice and respect general customs and usages as the law of the land, equally with the written law; and, when clearly proved, they will control the general law. This necessarily follows from its presumed origin: an act of parliament or a legisla-

tive act. Such would be our duty under the second section of the act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. * * * We cannot impute to congress the intention to not only authorize this court, but require it to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evinced by excluding from our consideration usages and customs which are the law of every government, for no other reason than that, in referring to the laws and ordinances in the second section, congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a royal order because it was not called a law. We should act on the same principle if the words of the second section were less explicit, and according to the rule established in *Henderson vs. Poindexter*. See 12 Wheat., 530, 540."

U. S. vs. Arredondo, 6 Pet., 414-15.

"In Texas the practice has long prevailed of receiving the evidence of intelligent Mexicans, not lawyers, as to the laws of Spain and Mexico in litigation pertaining to lands, and such evidence is pronounced by the courts of that state 'to have been valuable in giving information as

to the construction given to the laws of Spain and Mexico by the officers who executed them.'"

Rogers, Expert Testimony, 217.

State vs. Cueller, 47 Texas, 304.

I have no doubt that there has been a great deal of confusion on the subject of the sale of the lands of Sonora, by reason of not giving careful attention to the difference between the colonization law of August 18, 1824, and the law of August 4, 1824, referred to in the title papers in this case. The two laws are entirely different. There is no authority for the statement of counsel that the latter law "was purely and simply a revenue law and was never intended to reach the public lands."

Brief, page 65.

Nor do the facts warrant the statement that the states did not, until a late date, maintain that article XI. of this law gave them a right to dispose of their public lands.

Brief, page 78.

On the contrary, Sonora asserted its right from the beginning, and during the first session of its congress called attention of the national congress to its interpretation of the law, as is clearly shown

by the following communication to the governor of the state of Sonora, from the secretary of its congress:

OFFICE OF THE
SECRETARY OF THE STATE CONGRESS.

Most Excellent Sir—Based upon the law concerning the classification of federal revenues, and upon subsequent data, the honorable congress, in article XLVII., of the decree No. 23, declares that the right to issue confirmations of lands is one of the revenues of the state. The regulation of that branch was a consequence of this declaration. While this regulation was under advisement, the observations arrived which the commissary general makes in his letter of the 26th of the past month, and which your excellency had the kindness to transmit to us, together with another leter of the 21st of the same month. They refer to those presented under the date of December 13, in which said chief officer expresses doubts as to whom the proceeds of the sale belong, and about which he consulted from that time forward, the general government. The decision for which he asks has not yet come, and the honorable congress has waited three months for it, a sufficient time for it to have arrived. This silence alone, without there being any need for other reasons, which might here be alleged, confirm the opinion and convey the conviction that the said right of confirming land titles belongs to the state, and the

harm which might result to the state in the present depletion of its treasury by keeping this branch in a state of paralysis was another motive towards the issuance of the said declaration.

Done in to-day's session of the honorable congress and so communicated to your excellency, in order that you may transmit this resolution to the aforementioned commissary general, who shall at the same time be notified that, if after the usual procedure in such cases, it should be declared that the branch of public lands did not form a part of the state revenues, the national treasury is to be reimbursed in the amounts collected by the treasury of the state.

By this order your letter of the 27th of last April is now answered.

May God have you in his keeping many years.

FUERTO.

May 9, 1825.

TOMAS ESCALANTE, Deputy Secretary.

JOSE DE JESUS ALMADA, Deputy Secretary.

(Rubricas.)

The state waited three months prior to May 9, 1825, for a decision of the national government upon the question of the state's ownership of the public lands within her borders, and then the congress of the state passed the law of May 20, 1825, providing for their sale by the state.

Thereafter, and on the 2d of November, 1825, the "political constitution of the free states of the West" —Sonora and Sinaloa—was promulgated. Section 16 entitled "Of the Public Landed Property of the State." Article CCXCIII. provided: "The rents (revenues) that are not reserved to the federation, by their decree of classification, of the 4th of August of 1824 last passed, are those which until now have formed the elements of which the landed property of the state is composed * * *."

Had the national government disapproved the construction which Sonora placed upon the law of August 4, 1824, and communicated to it some time in February, 1825, we would not find the same construction concerning the right of disposition of its public lands in the constitution of November 2, 1825, nor in the subsequent recital found in the preamble to all grants issued by the state. It is certainly fair to conclude that some time between February and November, the national government signified to the state government its approval of the state government's construction of the laws of August 4, 1824.

The communication of the congress of May 9, 1825, and other records of Sonora, which, in our opinion, will be of great assistance in determining the right of the state to its public lands, was introduced in evidence in the case of Maish and

Driscoll vs. The United States, tried before the Court of Private Land Claims and appealed to this court. It has been stipulated that these records and communications are a part of the public records of the state of Sonora, and may be used and considered in the determination of this case, the same as if they had been originally introduced in evidence herein. These records were found after weeks of diligent search among the old archives of Sonora by Mr. Rochester Ford, of Arizona, and attention is particularly directed to them.

In 1870, the Mexican government officially published the "Memoria de Hacienda y Credito Publico," a history of the treasury department of the nation, going back before the revolution of 1821. On page 62 is given a table showing the revenues prior to the revolution. One of them is from the "ventas, compras y confirmaciones de tierras," or proceeds from the sale of lands. On page 80 is given a table prepared and submitted to the general government in 1825. It is an estimate of the various revenues which the government might be expected to receive, and shows the sources from which the revenues would be derived.

The table is as follows:

"Extracto de los valores, gastos y liquido de las rentas generales correspondientes a la Federacion por los soberanos decretos numeros 70 y 81.

RAMOS.

Derechos de importacion y exportacion.

Idem de internacion.

Renta del tabaco, incluyendo en la columnilla de gastos la compra y fletes.

Renta de polvora.

Alcabala que paga el tabaco en los paises de su cosecha.

Renta de correos.

Renta de loteria.

Renta de salinas.

Las de los territorios de la Federacion.

Bienes nacionales; fincas rusticas y urbanas del fondo piadoso de Californias, de temporalidades y de inquisicion.

Rentas decimales en las ocho catedrales de la nacion.

Idem de la mitra de Mexico.

Idem de la dignidad de tesorero.

Contingente de los Estados.

Averia.

Casa de moneda.

Peaje.

Creditos activos; deudores a la renta de salinas, de cuyo cobro hay esperanzas.

Prestamo extranjero."

(Translation.)

"Extract from the income, expenses and liquidation of the general (revenues) rents, corresponding to the federation, by the sovereign decrees, numbers 70 and 81.

BRANCHES.

Importation and exportation duties.

International duties.

Rents (revenue) from tobacco, including in the column of expenses, the purchases and freight.

Rents (revenue) from powder.

Duties paid on tobacco in the countries of its cultivation.

Rents (revenue) from the mail service.

Rents (revenue) from lotteries.

Rents (revenue) from the salt works.

Rents (revenue) from the territories of the federation.

National properties; rural and urban properties of the church fund of the two Californias, of the secular revenues and of the inquisition.

Tithing rents (revenues) of the eight cathedrals of the nation.

Tithing rents (revenues) of the bishopric of Mexico.

Tithing rents (revenues) of the dignity of the treasurer.

Contingent of the state.

Aviaries.

Mint.

Bridge toll.

Active credits; debtors to the rents (revenues) of salt works, for whose collection there may be hopes.

Foreign loans.

There is not the slightest intimation here that the Mexican government claimed any revenue from public lands, "tierras." As will be seen from opinion of Judge Sluss, printed as an appendix to this argument, "bienes nacionales" and "fincas rusticas urbanes" have no reference to the public domain.

> "The appellants, *on whom the burden of proof is cast*, to show want of authority, have produced no evidence, either documentary or historical, that the Spanish officers who usually acted as governors of the distant provinces of California

were restricted in their powers, and could not make grants of land.

* * * * * *

"An attempt to trace the obscure history of the various decrees, orders and regulations of the Spanish government on this subject would be tedious and unprofitable. *It is sufficient for the case* that the archives of the Mexican government show that such power has been exercised by the governors under Spain, and *continued to be so exercised under Mexico*, and that such grants, made by the Spanish officers, have been confirmed and held valid by the Mexican authorities. Sola styles himself political and military governor of California. He continued to exercise the same powers after his adhesion to the Mexican government, under the provisions of the plan of Iguala and the twelfth section of the treaty of Cordova. The grant in fee, given by Sola, was after the revolution."

United States vs. Peralta, 19 How., 343.

An again, in the same case, page 347:

"We have frequently decided that the public acts of public officers, purporting to be exercised in an official capacity and by a public authority, are not presumed to be usurped, but that the legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of title."

We feel confident that a consideration of the foregoing will lead this court to the conclusion expressed by the Supreme Court of Texas: "That extensive authority over the public land was vested in the state; that she possessed the property in the soil, and had alone the power by direct agency, of appropriating lands to individuals; that this power was never denied by the general government during the existence of the confederacy."

Republic vs. Thorne, 3 Texas, 499, 509.

THE GOVERNMENT UNDER THE CENTRAL SYSTEM.

It has been shown that the fee was in the states at the time of the adoption of the central constitution, which went into operation on the first day of January, 1837. It was in force in April, 1838, when the grant in question was made. The constitution of 1836 abolished the state legislatures, and the territory of the nation was by it "divided into departments, on the basis of population, locality and other contributing circumstances," which was afterwards declared by the law of December 30, 1836, to be that "The territory of Mexico is divided into as many departments as there were states," with certain modifications named therein.

The constitution of 1836 protected every person and corporation in their property rights.

The change from a state to a department was but a change of political rights, and not a change of property rights. This constitution did not destroy, nor did it purport to destroy, that invisible, intangible being, the state of Sonora; the name was changed, and the form of government to some extent, but the political entity was not annihilated, neither did the central constitution divest nor claim to divest the former states of their property rights to the vacant lands within their borders.

Subdivision 3 of the constitution of the central system of 1836, under the head of "The Formation of the Laws," article 45, reads as follows:

> "The general congress cannot deprive any one of his property, directly or indirectly, whether it be an individual or ecclesiastical or secular *corporation*."

The states and departments were regarded as political and public corporations for the purpose of government and the management of public affairs.

> "Neither the state *nor any other corporation* or public establishment enjoys the privileges of restitution *in integrim*."
>
> Title 3d, Art. 46, page 16, Civil Code of Mexico.

See, also:

New Hemstead vs. Hemstead, 2 Wend., 135.

The People vs. Utica Ins. Co., 15 John., 358.

Indiana vs. Worman, 6 Hill., 33.

Section 5, article 118, title 6 of the judicial powers of the Supreme Court of Mexico, 1843, provides:

> "To try in the same manner the judicial demands which a department may institute against another department as private individuals against a department, when they are reduced to a really contentious trial."

This would seem to be a declaration, at least by implication, that the departments held property; otherwise, of what avail would have been a judgment against it? A judgment, without adequate means to enforce it, is but a shadow.

This court has laid down the rule for the interpretation of legislation, as to the rights of property, as follows:

> "Whatever the power of a legislature may be, its acts ought never to be construed as to *subvert the rights of property*, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object."

"No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent, implied or constructed repeals ought ever to be understood as to divest a vested right.'

Rutherford vs. Green, 2 Wheat., 96.

Cited and quoted in U. S. vs. Aredondo, 6 Pet., 691.

The rights of the state of Sonora to her public lands inured to the benefit of the department of the same name.

There can be no doubt that such was the understanding of both the nation and departments. March 2, 1896, this court decided the case of Ainsa, Administrator, vs. The United tSates, on appeal from the Court of Private Land Claims. The title to property involved in that case was obtained from the department of Sonora, in 1843.

In the preamble to the grant papers, it is stated:

"Whereas, Article 11 of the sovereign general decree No. 70, of the 4th of August, 1824, ceded to the old states the revenues which in said law the general government did not reserve to itself, one of which is, that from the lands (terrenos) in their respective districts, which, therefore, belong to them, and for the disposal of which the honorable constituent congress of the state, which was Sonora and Sinaloa united, enacted

law No. 30, on the 20th of May, 1825, as did also the successive legislatures other decrees concerning them, which enactments have been retained in sections 3d, 4th, 5th, 6th and 7th of chapter 9 of the organic law of the treasury, No. 26, of the 11th of July, 1834, the said revenue from lands being now one of those of this department of Sonora, which have continued and must continue, as provided in article 1, of the decree of the 17th of April, 1837, that of the same month of 1839, and of the 24th of December, 1840," etc.

A like recital to the above is in the title papers of all grants made by Sonora when she was a department. The officer executing these title papers was required to and did make a report of his doings to the general government. Then we have here the construction of both the nation and the department upon existing laws relating to lands after the change to the central system of government. These were the laws, and this the manner of their execution, as understood by those whose duty it was to execute them.

It would be manifestly unjust to destroy property rights by putting a narrower construction upon these laws than they received by the officers charged with their execution, and a refusal to do so has marked every decision of this court where the subject has been considered.

None of the constitutions, plans or organic bases of government for Mexico, with the exception of the

constitution of 1824, and the present constitution of February 5, 1857, mentioned public lands or in any wise referred to their disposition.

The present constitution declares that congress has the power "to fix the rules to which the occupation and alienation of public lands ought to be subject and the price of said lands." This power was then given to the federal congress by the organic law for the first time, and for the reason, of course, that it was considered that congress did not have such power prior to the time that it received it from the states, and at the date of the adoption of the constitution of 1857.

It is not improper to inquire if the public lands at the date of the adoption of the constitution of 1857 were owned by the state, how did the states acquire them? If the departments were deprived of the land the theory must have been as follows: The states, under the constitution of 1824, having possessed the lands, in 1836, by the constitution of that date, the fee was lost to the departments and became vested in the federal government. In 1847, by the new constitution, the states were reformed, and the fee became vested in them again; in 1853, under Santa Anna, the departments were again established, and the fee became again vested in the federal government; in 1856, under Comonfort, the states were re-

established, and the fee became again vested in the states; and finally, by the constitution of February 5, 1857, the power became vested in the federal congress to dispose of the public lands.

It can hardly be seriously contended that the fee in the public lands had such a transitory existence. It would seem clear that no other theory can be advanced, except that, in 1824, the states were the owners of the public lands, and that the states and departments respectively held these lands until the constitution of 1857 was established, by which the states granted to congress the power to dispose of them. Let us suppose that while the states had an existence, they issued bonds in payment of claims against them; all property of either states or departments would have been fastened with a trust for the payment of such bonds, and it cannot be said that the holders of these obligations would have been deprived of their security by reason of a change in the political form of government of the respective states. The federal government would have had no legal or equitable right to take the security from the holders of bonds, or to deprive the states of the property which they held, and which they might dispose of in payment of their indebtedness.

The laws of the states remained in force in the departments after the change to the central system of

government. The preamble to all grants made during the departmental period clearly shows that this was the understanding of the national officers charged with the transaction of public business and the execution of the laws in the departments. After reciting the authority of the old states for the sale of the public lands, these statements in grant papers during the department period conclude as follows:

> "The said revenue from lands being now one of those of this department of Sonora, which have continued and must continue as provided in article I. of the decree of the 17th of April, 1837, that of the same month, 1839, and of the 24th of December, 1840, etc."
>
> Statement Preamble Grant Ainsa, *supra*.

On the 25th of May, 1838, the minister of the interior of the Mexican nation issued a circular relative to the laws of the states being in force, which circular was approved by the president, and is found in 3d volume, Comp. Laws of Mexico, page 557. This circular is indexed (page 806 of volume 3) as "Leyes de las Estados. Estan vigentes las que no estan expresamente derogadas?" the translation of which is "Laws of the States. There are in force those which are not in direct terms annulled." The full text of the circular is as follows:

"It must be principally noted that there are in force all such laws as are not openly inconsistent with the prevailing system, and unless they are found to have been expressly repealed by any other subsequent disposition, this rule also holding good in regard to those laws which were decreed (passed) in the very remote epochs, and under the different forms of government which the nation has had; and that, therefore, the courts and other authorities daily transact their various duties under the existence of the laws of the cortes of Spain, of the laws of Partidas and Compilation, as long as this disposition is not repugnant, more or less, to the form of government in which they were sanctioned.

"This principle being established, there follow two natural consequences; the first is, that there ought to be considered as in force the laws of the old states, whenever these contain the requisites mentioned above, unless they are repugnant to the form of government under which they had their origin, or unless the supreme government has enacted any other, since their requirements cannot be superior (paramount) to the laws.

"The other consequence is, that if the orders of the government were the result of some of its constitutional attributes, or of some other subsequent law that authorized such or another act, then the laws of the states ought not to be considered as in force, not because they are repugnant to the requirements of the government, but because the law authorizes it to decree this or

the other decree contrary to it, by the same right that any other decree is abolished by former legislation.

"From the foregoing it is the opinion of the commission that the advice of the government can be obtained, unless the council, with better judgment, resolves differently.

"Be pleased, your excellency, to advise his excellency and receive the documents which were transmitted.

"And this being approved by the president, he has seen fit to order it to be communicated to the governors of the departments, so that they may take notice of this decision for the general good."

SONORA'S CLAIM TO STATEHOOD AFTER THE CONSTITUTION OF 1836.

It will be noted that when Rodriguez bought the land in question, Sonora claimed to be acting as a free, independent and sovereign state under the constitution of 1824. Its local history from January 1, 1837, to 1841 being as follows:

After the abolition of the state legislatures, and the division of the Mexican territory into departments, as hereinbefore stated, Sonora acquiesced in the action of the federal government, and became a department, and transacted its business as such for nearly a year, when General Urrea, who had been act-

ing governor of the department under the central system, "proclaimed against it," reassembled the congress of the state, which met in December, 1837, and declared that Sonora should thereafter transact business as a free, sovereign and independent state under the constitution of 1824, and without regard to the constitution of 1836. This action of General Urrea, and of the congress of the state, was peacefully accomplished, and Sonora continued to act as a state, under the constitution of 1824, until about 1841, when she again conformed to the central system and became a department.

Testimony of Mr. Robinson, R., page 105.

This action of Sonora in protesting against the central system was not entirely unlike that of many of the former states of the nation. We learn from a history of those times that on the 8th of October, 1841, Jalisco, Cuanajuato, Zacatecas, San Luis Potosi and Queretaro sent representatives to the city of Queratero to protest against the plan of Tacubaya, under Santa Anna, and these representatives presented themselves as from their "states," and not *departments*.

It is said that this action of Sonora, in setting up a state government under the constitution of 1824, and refusing to act under the constitution of 1836, was revolutionary in its nature. This is true, but it does

not by any means follow that a title granted in Sonora, in 1838, is not valid. It is to be remembered that Sonora did not secede from the nation; she only claimed the right to exercise her political functions under the national constitution of 1824; the general government itself looked upon her as being a part of that government, and for a time permitted her to exercise the powers of statehood, choosing rather to bring her into harmony with the central system by judicious diplomacy than by force of arms. This policy was successful, and about 1840 she submitted to be governed in conformity to the departmental plan.

The Mexican nation has never questioned the validity of the transactions of public business by the public officials of Sonora during the period from 1837 to 1840, when they claimed to be the officers of the state and not of the department, and conducted the public business in the name of the state. Neither the general government nor Sonora herself ever repudiated the transactions of that period.

It is in evidence by a high public officer of Sonora, and is also shown by its archives, that more than twenty grants of land were made by the treasury department during the year 1838, and that the validity

of these grants has never been questioned, and they are recognized as legal titles to-day.

Testimony of Mr. Rochin, Record, pages 85-86.

And when it is considered how zealously the nation looked after matters respecting the public revenue, is it not fair to presume that had the national government considered that the state officers were exceeding their powers in making these grants, that we might find some law or decree disproving and annulling their acts?

In 1838, had some person deeded his land to the state of Sonora, the deed would have been good and passed title; and if that be true, the converse would be true, that a deed or grant made by Sonora to one of its citizens was valid.

It cannot affect the validity of the grant by being made in the name of the state; a political and public corporation, known as Sonora, conveyed this title and made a report to the federal government, and this report was accepted and acquiesced in, and not repudiated. (Record, pages 21-22.) As herein stated, long acquiescence is approval.

Sonora at least claimed to be a sovereign and independent state at the time of the sale of this land, and its claims were known to the federal government.

She was conducting public business and exercising all the prerogatives of statehood during this period, and was at least a state *de facto*, and as such could grant title to public lands in her possession, and these grants or sales would be good against either the nation or department.

Says Mr. Justice Baldwin, in The Lessee of Pollard's Heirs vs. Kibbe:

> "It is somewhat remarkable that there is no one opinion of this court, or any of its members, which even questions any one principle of the law of nations, as laid down in the cases of Harcourt vs. Gaillard, Henderson vs. Poindexter, Insurance Company vs. Canter, The United States vs. Soulard, Arredondo, Perchman, Delassus, Mitchell; Strother vs. Lucas, and Rhode Island vs. Massachusetts, in the latter of which these principles are reiterated. 'There are two principles of the law of nations which would protect them (the inhabitants of a disputed territory) in their property: First, that grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right; second, that when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred.'"
>
> 12 Peters, 748, 749.
>
> Pollard's Heirs vs. Kibbe, 14th Peters, 410.

See also,

Texas vs. White, 7 Wall., at pages 732, 733.

Let it be granted, then, that Sonora, notwithstanding her claim that she was a state, was only a department when the Algodones grant was made—she must have been one or the other—as a department she had the right and power to grant the vacant lands; such grant vested title in the grantee, and if it be claimed that the title thus passed was subject to defeasance by the disapproval of the national government, until such disapproval was formally signified, the estate remained in the grantee.

We will hereafter discuss the question of the approval of this grant by the Mexican government.

We conclude this branch of the case by saying that the Mexican nation having acquiesced in the powers of statehood by Sonora during the period in question, dealing with her as in the just use of the powers asserted and assumed, never treating her as one in a state of insurrection or rebellion, the law of nations will not permit the United States to take higher or different ground.

APPELLEE ACQUIRED WHATEVER TITLE THE NATION POSSESSED.

The title paper discloses all of the proceedings relating to the sale, and in the granting clause it says:

> "Wherefore, in the exercise of the faculties conceded to me by the laws, decrees and regulations, and the *superior existing orders* in relation to lands, by these presents and in the name of the free, independent and sovereign state of Sonora, as well as that of the august *Mexican nation*, I concede and confer upon, in due form of law, * * * the five square leagues, a little more or less, which were registered and which were sold to him at public auction by the junta de almonedas (board of sale) on the tenth of the present month. * * Wherefore, I give and adjudicate to * * etc."

This recital that the land was sold by the state and the "*Mexican nation*" is autopisty, and in the absence of positive proof should of itself conclude the United States from contending that the appellee did not have title from the national government. Where there is no clear showing to the contrary, the court will presume that the statement of the granting officer in the title paper is true. In other words, the presumption of law is that the officer acted

with authority; that his acts were legal, and that his statements are true.

United States vs. Peralta, 19 How., *supra*.

In addition to stating that the land was sold in the name of the *Mexican nation*, the granting officer says that it was sold to the grantor of the appellee by the *junta de almonedas* (board of sale). This board of sale was a board of national creation.

> "It was an official body expressly created by the Mexican national government, and invested with absolute power to make sales of public lands within that department" (Sonora).

Opinion of the court below.

Section 73 of the national decree of April 17, 1837, as follows:

> "All the purchases and sales that are offered on account of the treasury and exceed five hundred dollars, shall be made necessarily by the board of sales, which in the capital of each department shall be composed of the superior chief of the treasury, the departmental treasurer, the first alcalde, the attorney general of the treasury and the auditor of the treasury, who shall act as secretary. Its minutes shall be spread on a book, which shall be kept for the purpose, and shall be signed by all the members of the board, and a copy thereof shall be transmitted

to the superior chief of the treasury for such purposes as may be necessary, and to enable him to make a report to the supreme government."

Compiled Laws, volume 3, page 363, No. 1855.

Milla, who was auditor, and acting under the law as treasurer; Carillo, the promoter fiscal (attorney general), and Mendoza, the first alcalde, were the board who made this sale, and made it after all the proceedings had been referred to the attorney general, and he had declared the entire transaction regular and in due form of law.

Record, pages 16-17.

"A grant or concession made by that officer, who is by law authorized to make it, carries with it *prima facie* evidence that it is within his power. No excess of them, or departure from them, is to be presumed. He violates his duty by such excess, and is responsible for it. He who alleges that an officer entrusted with an important duty has violated his instructions must show it."

Chief Justice Marshall in U. S. vs. Delassus, 9 Pet., 117.

"Where the act of an officer to pass the title to land according to Spanish law is done contrary to the written order of the king, produced at the

trial without any explanation, it will be presumed that the power has not been exceeded, and that it was done according to some order known to the king and his officers, though not to the subjects, and courts ought to require very full proof that he had transcended his powers before they so determine it."

Strother vs. Lucas, 12 Pet., 410.

And, again, in the same case, it is said:

"In favor of long possession and ancient appropriation, everything which was done shall be presumed to have been rightfully done, and though it does not appear to have been done, the law will presume that whatever was to be done had been done."

If force is to be given to the law of October 3, 1835, which abolishes the state legislatures and destroyed the autonomy of the states, and which is "a sweeping decree of a congress subservient to the will of a dictator," passed during the existence of the national government under the constitution of 1824, then section 10 of that law, as follows:

"In everything relating to the department of the treasury, the government and the respective officers shall proceed in accordance with the laws, regulations and orders of each state in so far as may be compatible with the new organization of said revenues, until the general congress adopts suitable measures for the future."

Compiled Laws, volume 3, page 75, No. 1626, expressly continues the state officers, and directs them to proceed in accordance with state laws in all things relating to the department of the treasury.

The inquiry is naturally suggested, that if the states or departments owned the land, as herein contended, why did this board of national creation, exercising national authority, participate with the state officials in the disposal of these lands? To our minds, the history of the times, the unsettled and uncertain condition of the political affairs of the nation and the states, the doubt that necessarily followed this uncertainty, suggests the answer. It will be remembered that immediately upon the adoption of the constitution of 1836, Sonora for a time acquiesced and acted as a department of the government. During this time these national officers transacted its business, and for the purpose of removing all doubts concerning title they were about to pass, they took the precaution to have the sale in this case made by both the officers of the national and state governments; nor can we better answer the suggestion here made than to quote from the opinion of the court below upon this subject, as follows:

> "When we consider the particular circumstances by which they were confronted, it is not surprising that they proceeded as they did in making the sale in question. The change which

had taken place in the relations between the state and the nation, by a change to the central system, had been but of short duration. The act of the Mexican government, creating this board of sales, and empowering it to sell lands, had taken effect but a short time previous. There is no act of the supreme government affirmatively and clearly annulling the prior legislation of the state. The officers of the state, after the change, were continued in the same capacity as officers of the nation in the department. They were situated many hundred miles, across mountain ranges, from the seat of government, with, to us, inconceivably slow means of communication with it. The fact that even now sincere men sincerely differ as to the legal method of making that sale affords ground for supposition that these officials may have been perplexed with uncertainty as to the legal course to pursue, and concluded, as we lawyers say, 'out of abundance of caution' to seize both horns of the dilemma, and make the sale on behalf of both the nation and the state, and observe the requirements of the laws of both in making it. There was nothing illegal or reprehensible in such a course."

This board was authorized to make the sale on behalf of the nation, and it does not matter in what manner they recited the source of their authority; the *fact* that they *had* authority to pass title to the land is the important consideration.

In the case of the United States vs. Clark, 8 Peters, 436, cited by the court below, Lieutenant Governor Coppinger recited that he made the grant under authority of a certain royal order, of 1790, which order this court said did not authorize him to make the grant; it, however, appeared that under other regulations he was authorized to make grants, and the court observed:

> "We can not think that the recital of a fact entirely immaterial, on which the grant does not profess to be founded, can vitiate an instrument reciting other considerations on which it does profess to be founded, if the matter as recited be sufficient to authorize it. Without attempting to assign motives for the recital of that order, we are of opinion that in this case the recital is quite immaterial, and does not affect the instrument. The real inquiry is, whether Governor Coppinger had the power to make it."

In Chouteau vs. United States, 9 Peters, 137, it appeared that a grant was made by the lieutenant governor of the province. The lieutenant governors had no authority to make grants. The court, however, was satisfied that the lieutenant governor was also *ex officio* a sub-delegate, and that sub-delegates had authority to make grants. He did not know that he was a sub-delegate, and intended to make the grant as lieutenant governor. The grant professed to be

founded on his authority as lieutenant governor, which did not exist. The court there held that, inasmuch as Delassus had authority to make the grant, and did in fact make it, that the mis-recital of the source of his authority was unimportant, and the grant should be confirmed. In this case the supreme government was advised of the state's action in selling this land, and recognized, acquiesced and approved the same.

We are not left to conjecture, or to the legal presumption which follows these proceedings, to establish, that this title was approved by the supreme government of Mexico. The record discloses the proof of this fact.

On June 6, 1847, a certified copy of the title papers issued to Rodriguez, were, at his request, submitted by the general commissary of the department of Sonora to the minister of state of the land department of the republic of Mexico "to the end that the same may be presented to his excellency, the president of the republic."

Record, pages 21, 22.

This letter transmitting the title papers to the national officers, says the land was sold by the "junta de almonedas."

Record, page 22.

The fact that the sale was made by this board clearly appears from the title papers themselves. The junta de almoneda was a board of national creation, authorized to sell lands after the adoption of the constitution of 1836.

Sonora had submitted to the central system and was a department in 1847.

Judge Robinson says that the general government approved or disapproved sales of public lands during this period, and this was no doubt the reason why Mr. Rodriguez has his title sent to the city of Mexico, as herinbefore stated. That the national government acted favorably on this sale is shown by the following:

On the 8th day of June, 1857, Jose de Aguilar, governor of the state, certifies that the title was legally issued, and was approved by the Mexican government.

Record, page 26.

One of the records of the treasurer general's office, of Sonora, introduced in evidence by the appellee, is a certificate of Manuel Diaz, a former treasurer general of the state, and two citizens thereof, who had been appointed by the governor to examine and report upon the title to lands, which declares that:

"For the purpose of giving compliance to the foregoing disposition or order of the governor of the state, proceeded to examine, one by one, the signatures of which are contained in the expedienti that forms the title to the lands situated. * * * That in the year 1838 was adjudicated to Don Fernando Rodriguez, and *in that of 1847 was approved by the supreme government of the nation.*"

Record, page 87.

An examination of the title paper, the correspondence of different officials, and the certificates made by them introduced in evidence, make it certain that this title received the approval of the supreme government. That this evidence is competent to establish the fact of approval, the attention of the court is respectfully directed to the first case of Chouteau's Heirs vs. United States, *supra*, where like certificates and letters to those here presented for consideration were received for the purpose of determining the authority of the officer making the grant.

If the proof is not sufficient to establish the fact of approval, from it, at least, approval will be presumed.

If approval was necessary, it was not the duty of the grantee to transmit his title to the supreme government for its action. This was the duty of the

officers of the state or department, and yet in this case the grantee did in fact see to it that the papers were transmitted.

While California was a department, the governor was the granting officer; after he acted, the grant was sent to the department assembly for its approval; if the assembly disapproved, it was sent to the supreme government; if disapproved by the government, the estate was defeated. The Supreme Court of the United States has uniformly held that the estate vested upon the execution of the grant by the governor, and that, as it was the duty of the governor to procure the approval of the assembly or the supreme government, as the case might be, that the court would, in the absence of any showing to the contrary, presume that the grant had been approved.

Citing:

Hornsby vs. United States, 10 Wall., 224.

United States vs. Reading, 18 How., 4.
United States vs. Vaca, 18 How., 556.
United States vs. Larkins, 18 How., 558.
United States vs. Cervantes, 18 How., 553.
United States vs. Johnson, 1 Wall., 329.

See, also:

Wilcox vs, Chambers, *infra*.

In the Cervantes case, the archives showed that the grant had been presented to the departmental assembly for confirmation; that the committee reported in favor of the grant, and that it had been returned to the committee for its information.

> "This concludes the expedienti as certified from the archives. It does not appear whether any further action was taken on the subject by the assembly, nor do the books exist among the archives from which any further facts can be ascertained."

The first objection to the validity of the grant was that it was not approved by the departmental assembly. To this the court answer:

> "The first objection, if true in fact, has been disposed of by this court in the case of United States vs. Reading, decided this term. Besides, so far as the archives show any action of the assembly on this grant, it is an approval of it; and there is no evidence that it was rejected or annulled, or any further report made on it, the grantee should have the benefit of the presumption of a decision in his favor."

In the case of the United States vs. Alviso, 23 How., 318, there was no real grant,—but permission was given to occupy the land, and some proceedings were had. The court below in that case confirmed the title of the petitioner. On appeal, this court said:

> "Where proceedings for a grant of land in California were commenced by a Mexican in 1838, and continued from time to time, and no suspicion of the truth of the claim exists, *this court will not disturb the decree in his favor made by the court below.*"

As to the acquiescence of the Mexican government after a grant had been long made, this court has said:

> "A strong circumstance in favor of this conclusion is the fact that Soto's official acts of commissioner, in this case, were *never repudiated* by the government; on the contrary, his protocol was received and deposited in the public archives, where it still remains. His official acts, accepted and acquiesced in by the government, must be considered as valid, even if done by himself only as a commissioner *de facto*."

Gonzales vs. Ross, 120 U. S., 619.

It is not possible that the general government of Mexico was ignorant of this grant. For *fifteen years prior* to the treaty, it remained of record in Mexico; and more, it was forwarded to the supreme government for its action. *Long acquiescence without repudiation is an approval.*

If, as contended by the United States, the fee was vested in the federal government, then, under the foregoing, this court ought not to disturb the decree

in favor of appellee, who, in the language of Mr. Justice Murray, of the court below, "bought the land in good faith, and has expended in improvements upon it a large amount of money;" or, as observed by Mr. Justice Sluss, who delivered the opinion below, "has invested his fortune in the attempt to render the land fit for cultivation."

SANTA ANNA'S DECREES OF NOV. 25, 1853, AND JULY 7, 1854, ANNULLING GRANTS.

After Santa Anna's return to Mexico he assumed dictatorial and despotic powers, and we again find him at the head of a revolution, which, bowing to his will, resulted in his own declaration that he was president for life, with power to appoint his successor.

Decree of Santa Anna, December 16, 1853.

Prior to this, and on the 17th of March, 1853, under the modified "plan" of Jalisco (which plan, in effect, provided for the selection of a dictator), Santa Anna had been declared president, and on the 22d of April following, he issued his decree abolishing all legislative bodies and assuming supreme power. Under this *regime*, and after he had put the constitution behind him, the decrees of November 25, 1853, and July 7, 1854, were promulgated.

The history of current events during these periods in the United States, and the utterances of officers in high places in America, show how these similar attempts at usurpation of power by military chieftains in Mexico, whose highest duty to their country seemed to be to destroy constitutional government and "proclaim" themselves supreme, were regarded in our own country.

1 Wharton Int'n Law Digest, page 303.

The Gadsden treaty was signed December 30, 1853, and thereafter duly ratified. It is contended by the United States that these decrees of Santa Anna destroyed whatever claim of right the appellee herein had to the land in controversy. To this contention we answer that neither of these decrees in any wise affect this title, and that the most that can be said for them on the part of the United States is, that they contain a declaration, made by a military usurper acting as the head of the Mexican nation, that neither the states nor the departments were ever vested with title to these lands. It is a principle too elementary to need the citation of authorities that if appellee, or his grantors, had vested rights in the land at the date, or prior to the date, of Santa Anna's decrees, those rights could not be divested by either of the decrees of any dictator or the law of any constitutional government.

The grant to Rodriguez was a *contract*, which could not be *revoked without giving the grantee a hearing.*

On the 3d of August, 1851, Mr. de la Rosa, Mexican minister accredited to the United States, notified Mr. Webster, secretary of state, that on the 22d of May, 1851, the Mexican congress had annulled a decree of General Salas of the 5th of November, 1846, making a grant with the purpose of assisting in the promotion of a railway across the isthmus of Tehauntepec, for the reason that General Salas had no authority to make the grant. Mr. Webster replied to this communication on the date of August 25, 1851, in part, as follows:

"This communication has been laid before the president of the United States, who has directed the undersigned to make the following reply:

The right of the Mexican congress to pass any laws which may conform to the constitution of that republic cannot be questioned. The undersigned will not take upon himself to say that the law communicated by Mr. de la Rosa is unconstitutional in Mexico, and presumes that if any citizens of the United States who may conceive their rights to be thereby affected should entertain that opinion, they will have no difficulty in obtaining speedy and impartial justice from the judicial tribunals of that country. This impression is confirmed by the note of Mr. de la Rosa

to the undersigned of the 7th March last, in which, on behalf of his government, he himself declares that the validity of the Garay grant is a judicial question to be decided by the Supreme Court of Mexico. In his reply to that note, the undersigned contended that the Mexican executive, in negotiating the Tehauntepec Treaty, had waived the consideration of the validity of that grant, even as a judicial question. Consequently the information communicated by Mr. de la Rosa has justly excited both surprise and regret.

The grant referred to, and the privileges conferred by the decrees of the Mexican government relating thereto, including the decree of General Salas of the 4th of November, 1846, in the judgment of the undersigned, constitute a charter. In all civilized countries, instruments of this description are considered as contracts between a government and the parties upon whom they are bestowed, conferring privileges which are not to be revoked without a reasonable cause, and without allowing the grantees a hearing in defense of their right, and not liable to be annulled at the pleasure of the executive or legislative power.

Unpublished Correspondence State Dept

None of these decrees of Santa Anna affect this title. They were made after the Gadsdend treaty. The two will be construed together. The one of November 25 was a sweeping declaration, declaring null all grants made by the states or departments, "with-

out express mandate and sanction of the general powers in the form prescribed by law." As modified by the decree of July 7, holders of these state or department titles—not other persons, but holders of these titles—were required to submit them to the review of the supreme government. Santa Anna was hard pressed for money, and he no doubt took this, as well as many other unworthy means, to frighten the timid and blackmail those who had vested rights in property, into paying him money for the alleged purpose of perfecting their titles. The decree of July, 1854, was after the change of sovereignty over the territory in controversy. That of November 25, 1853, did not take effect in Sonora until promulgated there. By its own terms it was not promulgated at the seat of the national capital until December 2, 1853. Sonora is more than 1,000 miles distant from the city of Mexico, and it cannot be presumed that Santa Anna's decree was promulgated there until after the date of signing the treaty, December 30, 1853.

> "But the laws of the Mexican states did not take effect in any part of the country until they were promulgated there. * * * Besides, the commissioner was a public officer, having a public duty to perform, and, in the absence of evidence to the contrary, the presumption would be

that he acted in accordance with the law as known at the time."

Gonzales vs. Ross, 120 U. S., 605-616.

See, also, *Houston vs. Robertson*, 2 Texas, 1, 28.

In the Gonzales case, it was held that it was not probable that an act of the Mexican state congress, passed at the city of Monclova, March 26, 1834, was promulgated at Dolores, a point about 200 miles distant, prior to the 18th of the following April—twenty-three days.

We believe we have heretofore shown the grant under consideration was made with the "express mandate and sanction of the general powers in the form prescribed by law," and therefore, for this reason, it is not within the provisions of Santa Anna's decree.

All rights accruing under treaties between nations are fixed as of the date of signing, unless the nations contracting agree upon a different date. Between the high contracting parties, the ratification of treaties relates back to the time of signing.

Davis vs. The Police Jury of Concordia, 9 How., 279.

The United States and Mexico fixed a different date than that of the signing of the treaty, when property rights should be respected, and, so far as grants of land were concerned, it was agreed that such rights should date as of the 25th of September, 1853. On that day Mr. Gadsden made the proposition of this government to purchase the territory thereafter acquired, and the United States agreed with the Mexican nation, by article 6 of the treaty, as follows: "No grants of land within the territory ceded by the first article of this treaty, bearing date subsequent to the day—25th of September—when the minister and subscriber to this treaty, on the part of the United States, proposed to the government of Mexico to terminate the question of boundary, will be considered valid or will be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located or duly recorded in the archives of Mexico."

This is a declaration that the government of the United States took the territory acquired by the Gadsden purchase subject to whatever grants had been properly made prior to September 25, and under the laws and conditions existing at and prior to that time. If the government of Mexico could not have granted any lands after September 25, it could not

have annulled grants made prior to that time. In other words, all titles would have remained in *statu quo*. Such was the evident intention of both governments. Article V. of the Gadsden treaty provided that articles VIII., IX., XVI. and XVII. of the treaty of Guadaloupe-Hidalgo were included in and made a part of the former. Article VIII. of the treaty of Hidalgo provided that Mexicans established in the ceded territory had the right to remain there or remove at any time into the republic of Mexico, preserving in said territory property which they possessed. The grantee of the land in question *possessed* the same at the time of the transfer of the territory, and he and his successors are entitled to be protected in that possession by the United States.

The terms of the treaty itself, to my mind, clearly demonstrate that this government did not claim anything by virtue of the Santa Anna decrees, otherwise they would have been made part of the treaty.

> "The terms of a treaty are to be applied to the state of things then existing in the ceded territory." *Strother vs. Lucas*, 12 Pet., page 438; *United States vs. Clark*, 8 Pet., page 451. "In the treaty of cession, no exceptions were made, and this court has declared that none can thereafter be made; 8 Pet., 463. The United States must remain content with that which contented them at the transfer, when they assumed the precise

position of the king of Spain." *Strother vs. Lucas*, 12 Pet., page 446.

See, also:

Haver vs. Yaker, 9 Wall., 32.

U. S. vs. Yorba, 1 Wall., 412.

And opinion Justice, printed as appendix to this argument.

Santa Anna was not able to maintain himself under the title of "Most Serene Highness," which he modestly gave to himself, for any great length of time, and in August, 1855, he abandoned the presidency and took flight to a foreign country. On December 3, 1855, President Alvarez issued his decree of that date repealing the decrees of Santa Anna of November 25, 1853, and July 7, 1854.

Compiled Laws, volume 7, page 627.

Which decree of the acting president of the republic was followed by a law of the constituent congress, declaring *null* the decrees of Santa Anna of November 25, 1853, and July 7, 1854. The general congress does not recognize these decrees of Santa Anna as being of any force during the time they remained unimpeached. It is not said that they are *repealed*, but they are declared *null*, the congress first declaring "that * * * in the use of the *faculties* which it has

to review the *acts of the executive*, decrees what follows: First, the decree of November 25, 1853, and of July 7, 1854, are *null*."

Hall, page 169, Compiled Laws, volume 8, page 269.

This is the declaration of a tribunal exercising appellate and final jurisdiction. The congress of Mexico alone had the right to review the acts of the executive and to pass judgment upon the laws and decrees of that nation. The decree recites the power of congress to *review the acts of the executive*.

This is a declaration that this court will respect. It can not be doubted that had the Supreme Court of Mexico the authority to declare a law of that nation void *abinitio*, this court would consider such a declaration binding upon it.

Voorhies vs. Bank, 10 Pet., 449.

Such is, in effect, the situation with reference to Santa Anna's decrees. They have been declared void by the only authority authorized to pass upon them.

It is claimed by the United States that because this government recognized Santa Anna as the head of the Mexican nation when it acquired the territory in question, treated with him as such, that we must also recognize all of his acts in relation to these pub-

lic lands as binding upon this government, and the learned justice who delivered the dissenting opinion in this case was of opinion that this contention of the United States was well founded. Section 31 of Mr. Wheaton's International Law is quoted in support of this. The section referred to reads:

> "Where a foreign government and their subjects treat with the actual head of a state, or the government *de facto*, recognized by the acquiescence of the nation, for the acquisition of any portion of the public domain, or of private confiscated property, the acts of such government must on principle be considered valid by the lawful sovereign on his restoration, although they were the acts of him who was considered by the restored sovereign as an usurper."

The appellee contends that this quotation from the distinguished writer on international law, has no application to the case at bar, and that the learned justice misconceived the legal significance of the language used by Mr. Wheaton.

The act of Santa Anna was in no legal sense a *confiscation of property*. It was an act arbitrarily *vacating grants* wherein rights had become vested. Confiscation, as here used, "is the act of a sovereign against *rebellious subjects*." Confiscation recognizes *the title of the original owner*. Santa Anna did not rec-

ognize the title of any one; but, on the contrary, declared that the grantees of these lands had no title.

There are certain acts which an usurper cannot do and be sustained by the tribunals of any civilized country. The decrees of Santa Anna are of that character. He went beyond the right of an usurper. What civilized nation could uphold these decrees, *vacating grants* of citizens not in rebellion, but loyal to his administration? These persons possessed rights of property never adjudicated upon by any judicial tribunal. The great principles enunciated by the South Carolina Supreme Court, in Bowman vs. Middleton, in 1780, will be upheld by every honest tribunal. The court in that case set aside an act of the colonial legislature in attempting to take away the freehold of one man and vest it in another, without any compensation, or any previous attempt to determine the right, as being against *common right* and the *principles* of *Magna Charta*. The court declared the act to be *ipso facto* void, and that no length of time could give it validity. Constitutional inhibitions against such legislation are unnecessary, for the court proceeded upon the great fundamental principles which support all governments and property. A legislative act contrary to the great first principles of the social compact is invalid.

Calder vs. Bull, 3 Dall., 386.

Vattel, in speaking of the rights of a sovereign, says:

> "Every proprietor has a right to make what use he pleases of his own substance, and to dispose of it as he pleases, when the rights of a third person are not involved in the business. The sovereign, however, as the father of his people, may and ought to set bounds to a prodigal, and to prevent his running to ruin. * * * *But he must take care not to extend this right of inspection so far as to lay restraint on his subjects in the administration of their affairs which would be no less injurious to the true welfare* of the state than the first liberties of a citizen."

Vattel, Law of Nations, page 115.

> "It undoubtedly must rest as a general rule, in the wisdom of the legislature to determine when public uses require the assumption of private property; but if they should take it for the purpose, not of a public nature, as if the legislature should take the property of A and give it to B, or if they *should vacate a grant* of property, or of a franchise, under pretext of some public use or service, such cases would be *gross abuses of their discretion, and fraudulent attacks on private* rights and the law would be clearly unconstitutional and void."

Kent, volume 2, page 340.

And again, in volume 1, page 19, Chancellor Kent says:

> "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of the established writers on international law."

Santa Anna was acting as the president of a republic. His acts in attempting to vacate grants were subversive of the very fundamental principles of a republic. A republic is a state in which the exercise of sovereign power is lodged in representatives elected by the people. Let us suppose that the act vacating grants had been passed by the congress of Mexico; such acts would not be sustained. They would be against every principle of law, equity and common right. The case would then have stood thus: The federal government claimed the lands, and the state of Sonora likewise claimed them. Who is to decide the question of title between the two parties? When two or more parties claim the same property, the declaration of neither party is decisive of the right of property. Such questions must be settled either by compromise, by arbitration or by establishing some tribunal authorized to determine the question. Such has always been the

views of our own government. The articles of the confederacy were not signed by all of the colonial states until the compromise was made as to the right and title of the public lands. The same just principle was acted upon by the United States within the last few years. Texas claimed land embraced within the county of Green, as appeared on the map of Texas, in the northern part of that state. The United States claimed the same as part of the territory of Oklahoma, but made no legislative declaration that the land did not belong to Texas. It passed an act authorizing the attorney general to bring suit in equity in this court, in order that the claim to the land might be judicially determined.

United States vs. Texas, 143 U. S., 621.

Attention is called to the case of the lessees of Marlott vs. Silk & McDonald, 11 Pet., 39, where this court said: "Both Pennsylvania and Virginia having claimed the territory of which the land in controversy is a part, as being in their limits, the dispute was finally adjusted by a compact between them, which was ratified by Virginia on the 27th of June, 1780, with certain conditions annexed, and absolutely by Pennsylvania on the 23d of September, 1780, with an acceptance of the conditions annexed by Virginia.

"The question arises under, and is to be decided by, a compact between two states, *where the decision is not to be collected from the decisions of either state*, but is one of international character."

In the case at bar we find no compact with the federal government of Mexico and the several states until the establishment of the constitution of 1857, authorizing the federal congress to dictate rules concerning the alienation of public lands. To say, then, that Santa Anna, under the circumstances of the case as president of a republic could, with one sweep of the pen, destroy vested rights to thousands of acres of lands is a proposition that will not be supported by the tribunals of any enlightened nation. We repeat, it is against law, equity, and common right.

This court held, in Fletcher vs. Peck, 6 Cranch., 78, that a party to a contract could not pronounce its own deed invalid, although that party be a sovereign state.

The appellee further contends that if said decrees of Santa Anna were valid, as the facts appear in this case, he cannot be deprived of the land. These decrees were not wholly self-enforcing. There remains something to be done after the decree has issued, before the grantee could be deprived of his property. Article 3 declared that certain officers were to claim and receive, in the name of the nation,

the lands comprehended in article 1, "and which are found in possession of corporations or private individuals, whatever be their prerogatives and category." The land in question was never taken possession of in the name of the nation, or otherwise, under these decrees, nor was any attempt made to take possession thereof. The grantee was in possession when the transfer of territory was made under the treaty to the United States, and he and his successors have been in such possession ever since, and are entitled under the treaty to be protected in that possession. Possession is property. The decrees, if valid, only destroy the *paper title*, which is *evidence* only of the right to the property.

CONDITIONS OF THE GRANT, POSSESSION, ETC.

The appellant denies in its answer that Rodriguez, the grantee of the state, ever complied with the conditions imposed by the laws of the state of Soñora and the republic of Mexico upon citizens to whom its vacant lands were disposed, and avers that the conditions attached to, and running with said grant, imposed by law, as well as by the terms of the grant itself, were never complied with, and in another part of its answer demands that the plaintiff be put to his proof, as to compliance with all

of the conditions precedent and subsequent, and as required by the act approved March 3, 1891.

The conditions annexed to the grant in this case are as follows: "That he shall settle and cultivate said land as soon as the circumstances surrounding that distant and desert portion of the state may permit him to do so, in view of the imminent risk and danger there is on account of savages; but when the said lands shall once be settled and cultivated, they shall be kept in this condition, and that they shall not be unoccupied and abandoned for any time, and if the same shall be abandoned for the space of three consecutive years, and any one else should denounce said lands, in that event, after the necessary proceedings, they shall be declared vacant," etc., and such were in effect the conditions under which Rodriguez petitioned for the purchase of the land.

The second condition annexed, to-wit: "That after the lands were once settled and cultivated they shall not be abandoned for the space of three consecutive years," is thought to be of no special importance in this controversy, for this only gives the right to a third party to denounce the lands, and by proper proceedings on the part of the government, have the same declared public land, and again sold to the highest bidder. And it certainly cannot be seriously contended on the part of the United States,

that under this condition either the state of Sonora, had the grant remained within its jurisdiction, or the government of the United States, to whom the jurisdiction was ceded, would or could have produced a forfeiture without denouncement by some third person.

It is taken for granted that the answer of the defendant, concerning the condition, is directed to the first of the conditions, to-wit: That the lands shall be cultivated as soon as circumstances will permit the grantee to do so.

There was considerable controversy at the trial of this cause as to whether this condition was precedent or subsequent, and it is important that that question should be first determined.

When a condition must be performed before the estate can commence, it is called a condition precedent; but where the effect of a condition is either to enlarge or defeat an estate already created, it is then called a condition subsequent.

4 Kent, 125.

A condition precedent is one that must take effect before the estate can vest.

2d Devlin on Deeds, section 964.

The language of this grant is:

> "I give and adjudicate to the said Senor Don Fernando Rodriguez, as a legal sale for himself, his children, his heirs and successors, the said five square leagues of vacant lands, contiguous to the Gila and Colorado rivers, situated in front of the confluence of the same, as also opposite to the point El Paso De Los Algodones, of the said Colorado river, on the northern frontier of this state, under the conditions," etc.

In Arredondos case, 6 Peters, 691, the language of the grant was as follows:

> "I grant to them the part which they solicit of the said tract belonging to the royal domain, in conformity to the sovereign disposition on this matter, and the precise conditions to which they obligate themselves to establish thereon two hundred families, which ought to be Spanish, with all the requisites which are provided for, and others which will be provided by this superintendency, in virtue of the said royal order, the said establishment to begin to be carried into effect in the term of three years at the farthest, without which this grant will be null and void."

At page 745, Mr. Justice Baldwin, speaking for the court, says:

> "We now consider the conditions on which the grants were made. According to the rules, and the law by which we are directed to try this case, there can be no doubt that they are subsequent. The grant is in full property in fee,

an interest vested on its execution, which could only be divested by the breach or non-performance of the conditions, which were: That the grantees should establish on the land two hundred Spanish families, together with the requisites pointed out, and which shall be pointed out by the superintendency, and begin the establishment within three years from the date of the grant."

In the case of Fremont vs. The United States, 17 Howard, 442, the language of the grant is as follows:

"I have granted to him the aforesaid tract of land, declaring the same by these presents his property in fee, subject to the approbation of the most excellent the department assembly, and to the following conditions:

First—"He shall not sell, alienate, nor mortgage the same, nor subject it to taxes, entail, or any other incumbrance."

Second—"He may enclose it, without obstructing the crossings, the roads, or the right of way. He shall enjoy the same freely and without hindrance, destining it to such use or cultivation as it may most suit him; but he shall build a house within one year, and it shall be inhabited."

Of this grant, the court says:

"It has conditions attached to it, but these conditions are subsequent."

In the case at bar, the grant is *in presenti*—"I give and adjudicate." Nothing further was to be done by the government. It is not even provided in the grant that it shall be defeated, in the event of a non-compliance with the condition of settlement.

This, then, being a perfect title, it rests with the United States to show that it had been defeated prior to acquisition of the sovereignty by the United States, by proper proceedings on the part of the grantor, for non-compliance with the condition. This they do not show, nor attempt to show, so that at the time this government acquired the sovereignty over the territory in which this grant lies, it still remained a perfect title in the grantee, or those lawfully holding under him. But, if the law were otherwise, and it rested upon the grantee, and those claiming under him, to show that the conditions annexed have been complied with, still the grant ought to be confirmed.

In considering these questions the court is a court of equity. The act creating the Court of Private Land Claims provides:

> "All proceedings subsequent to the filing of the petition shall be conducted, as near as may be, according to the practice of the courts of equity of the United States."
>
> "Equity abhors a forfeiture."

It appears by the evidence in this case (record, pages 63, 64, 65) that repeated attempts had been made by the grantee to perform the condition annexed, but that he was prevented and driven back by the hostile savages infesting that region; and it is a matter of history, of which this court must take judicial cognizance, that from the time of the acquisition of this title until this territory passed under the dominion of the United States, by the Gadsden treaty, this portion of the country was overrun by hostile tribes of savages, warring between themselves, and aggressively resisting any efforts to settle the country, and that no white man's life was safe there, until these savage tribes were overawed and subdued by the power of the United States.

The evidence is clear and uncontroverted that shortly after the Gadsden purchase, and as soon as there was protection to life, Juan A. Robinson took possession of this land, and remained in possession until he sold the property to The Commercial Land Company. This company was, and for many years had been, in actual possession of the land, at the time Judge Sanford purchased the same. Like possession was held by him, by the Algodones company, and by the appellee, who has in good faith expended large sums of money in cultivating, building, irrigation canals and improving the property.

In Arredondo's case, the court say:

"Great allowance must be made, not only from the distracted state and prevalent confusion in the province at the time of the grant, but until the time of its occupation by the United States, though a court of law must decide according to the legal construction of the condition, and call on the party for a strict performance; yet, a court of equity, acting on more liberal principles, will soften the rigor of the law, and though the party cannot show a legal compliance with the condition, if he can do it *cy prvs*, they will protect and save him from a forfeiture."

"All favorable presumptions will be made against the forfeiture of a grant."

Gonzales vs. Ross, 120 U. S., 605.

"It is a condition subsequent, which at the worst only left the title of the grantee open to be denounced, but as the claimant was hindered from performing it by the revolutionary state of the country, the non-fulfillment of it would not work forfeiture of his title."

U. S. vs. Vaca, 18 Howard, 556.

"Regarding the grant of Alvarado, therefore, as having given him a vested interest in the quantity of land therein specified, we proceed to inquire whether there was any breach of the conditions annexed to it during the continuance

of the Mexican authorities which forfeited his right and revested the title in the government.

"The main objection on this ground is the omission to take possession, to have the land surveyed, and to build a house on it within the time limited in the conditions. It is a sufficient answer to this objection to say that negligence in respect to these conditions, and others annexed to the grant, does not of itself always forfeit his right. It subjects the land to be denounced by another, but the conditions do not declare the land forfeited to the state, upon the failure of the grantee to perform them."

Fremont vs. U. S., 17 How., 442.

In another place, in the same case, it is said:

"Now it is very clear from the evidence that during the continuance of the Mexican power it was impossible to have made a survey, or to have built a house on the land, and occupy it for the purposes for which it was granted. The difficulties which induced the governor to dispense with a plan, when he made the grant, increased instead of diminished. We have stated them very briefly in this opinion, but they are abundantly and in more detail proved by the testimony in the record. Nobody proposed to settle on it, or denounce the grant for a breach of the conditions. And at the time when the Mexican authorities were displaced by the American arms, the rights which Alvarado had obtained by the

> original grant remained vested in him, according to laws and usages of the Mexican government, and remained so vested when the dominion and control of the government passed from Mexico to the United States."

It having been impossible to comply with the conditions annexed to this grant, until the dominion of the country had passed to the United States, a nation whose laws, customs and usages differed in the extreme from the ceding nation, the performance of the condition is excused and the grant is single.

> "It is an acknowledged rule of law, that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single. We are not prepared to say that the condition of the settling two hundred families has been or is possible; the condition was not unreasonable or unjust at the time it was imposed. Its performance would possibly have been deemed a very fair and adequate consideration for the grant, had Florida remained a Spanish province. But to exact its performance after its cession to the United States would be demanding the *summum jus* indeed, and enforcing a forfeiture of principles which, if not forbidden by the common law, would be utterly inconsistent with its spirit. If the case required it, we might feel ourselves at all events justified, if not compelled, to declare that the performance of this condition had be-

come impossible by the acts of the grantors, the transfer of the territory, and the change of government, manners, habits, customs, laws, religion, and all the social and political relations of society and of life. The United States have not submitted this case to her highest court of equity on such grounds as those; we are not either authorized or required by the law which has devolved upon us the final consideration of this case to be guided by such rules or governed by such principles in deciding on the validity of the claimant's title. Though we should even doubt, if sitting as a court of common law, and bound to adjudicate this claim by its rigid rules, the case has not been so submitted. The proceeding is in equity; according to its established rules our decree must be in conformity with the principles of justice, which would in such a case as this not only forbid a decree of forfeiture, but impel us to give a final decree in favor of the title conferred by the grant."

United States vs. Arredondo, *supra.*

There is another fact present in this case that appeals even more strongly to a court of equity. *Rodriguez paid his money to the state of Sonora for this land, an adequate consideration.* In the Fremont case it is said:

"The words of the grant are positive and plain. They purport to convey to him a present

> and immediate interest, and the grant was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee. This inducement is carefully put forth in the title papers, and although this can not be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim; and when the grant was made on that consideration, the title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same condition."

There is nothing in the act creating the Court of Private Land Claims which requires it to depart from, or narrow the application of, the high principles that have alike characterized the legislation of our government and the judgments and decrees of her highest judicial tribunals, in respect of property rights in ceded territory. It is but confirmatory of the observations of Mr. Justice Field in the case of The United States vs. Augnisola, *supra*.

The answer of the United States, so far as it relates to the condition annexed to the grant, is evidently upon the theory that this case is within the provisions of the eighth subdivision of section 13 of the act creating the Court of Private Land Claims. Such is not the case. The eighth subdivision has no application

to such title as the one now presented to the court. It is well known that a large number of what are commonly called grants in Florida and Louisiana, as well as in the territory acquired from Mexico, were not grants in an accurate sense. They were incipient, inchoate titles, which required some further act on the part of the government after the fulfillment of the conditions, in order that a complete title might be vested in the claimant. They were frequently denominated concessions. They were simply an authorization to acquire at some future time a title.

Glenn vs. United States, 13 Howard, 250.

United States vs. Mills Heirs, 12 Peters, 250.

United States vs. Kingsley, *idem*, 477.

Fremont vs. United States, *supra*.

United States vs. Hanson, 16 Peters, 196.

Hancock vs. McKinney, 7 Texas.

A concession is "whatsoever is granted as favor or reward as privileges granted by the prince."

De Haro vs. United States, 5 Wall., 599.

That this subdivision has reference to such incipient titles, and to such only, is plain from the language used. "No concession, grant or other authority *to acquire land*," is the language of the section.

Is it not plain that the word "grant" is not used in this subdivision in the sense of an absolute title?

We are not here upon a concession claiming a right to acquire land. We are here asking this court to say that our grantor did acquire land, and to quiet our title thereto, as against the United States.

RECORD OF THE GRANT.

This title was "duly recorded," as required by the 6th section of the treaty. This is denied by counsel for the United States upon the ground that no note is made in the book called "Toma de Razon" of the issuance of the title, and the following cases are cited:

United States vs. Vallejo, 1 Black. 549.

United States vs. Osio, 23 How., 273-279.

United States vs. Teschmaker, 22 How., 392-345.

The case at bar, however, is to be distinguished from these cases. In the Vallejo case, the only document in evidence in support of the title of the claimant was the naked grant, upon which the secretary had made the following notation: "Note has been made of this title in the respective book." This was shown to be untrue. The reason given by the court for insisting that record of the grant should appear

in the archives was that "without this grant the officers making the grants would be enabled to carry with them in their travels blank forms and dispose of the public domain at will, leaving the government without the means of information on the subject till the grant is produced from the pocket of the grantee." It is to be observed also that this judgment was by a divided court, Justices Grier and Wayne vigorously dissenting.

In the case at bar the original documents were shown to be on file in the archives of the state of Sonora; they were examined by the justices of the Court of Private Land Claims, who traveled to Hermosillo for that purpose, and were by the whole court pronounced genuine. There is also a record of the payment of the purchase price, fees and charges. So that the reason given in the Vallejo case for insisting upon the memorandum in the index of titles has no force here. The Toma de Razon, it appears, was simply a memorandum or index of titles, and the original documents being found in the proper archives are surely much higher evidence of the grant than would be a simple memorandum that the title papers had been issued.

The grantee is not to be held responsible nor to suffer loss for the failure of a clerk to perform his

duty; particularly when he shows all of the original documents to be in the archives of Sonora.

In the Osio case, there was a simple license to occupy; no interest in the land had been acquired by the petitioner. The duplicate copy of the grant from the Mexican archives bore no signatures. Here the expediente found in the archives is complete, and bears the signatures of the proper officers, proved to be genuine.

In the Teschmaker case, the court, commenting on the absence of record evidence, say: "The non-production of this record evidence of the title, under the circumstances, is calculated to excite well grounded suspicions as to its validity, and throws upon the claimant the burden of producing the fullest proof of which the party is capable of the genuineness of the grant. We do not say that the absence of the record evidence is of itself necessarily fatal to the proof of the title; but it should be produced, or its absence accounted for to the satisfaction of the court."

As has been observed, the appellee showed that the original documents were in the archives at Hermosillo, where they ought to be. They were shown to be genuine by abundant proof, to the satisfaction of all of the justices of the court below.

A great deal of speculation has been indulged in, because there was not found in the book called *Toma de Razon* a note, memoranda or register of the Algodones grant. The memoranda of grants found in this book are substantially as follows: On the ..... day of ....., 18.., there was issued by this treasurer general, in favor of ....., the corresponding title of.....sitios of land which is comprised in the place called ....., and to which this expedienti refers.

We will briefly consider how the book is made up, and of what it consists. It is in shape of an "old-fashioned school copybook," unfolded sheets stitched together and then parchment bound. It contains eighty-two pages, sixty-eight of which are of paper, with the seal of the state stamped (printed) at the head of each sheet. This sealed paper is all of the same kind and of the same year. The remaining sheets consist of common paper without stamp or seal; each of these pages has two and sometimes three memoranda of grants like the above; the first entry in the book is dated October 4, 1831, and the last dated 1849. The sixty-eight pages of stamped paper contain entries from date of October 4, 1831, to October 30, 1845. The margin of each of these pages

bears the rubrica of Jose Maria Mendosa, treasurer general of the state. (Record, pages 86, 169, 180-181.)

Upon these loose sheets of paper are found original writings or drafts of instruments. Hundreds of these appear in the archives of the state of Sonora; they are the original evidences of a record, and called "borradors." From these, all records of expedienti, testimonios and other instruments are made up. (Record, page 180.) Three times the records of Sonoro have been removed from the capitol at Arispe to Ures, and then to Hermosilla. It is but five years since the records were arranged as they now are, and before then there must have been but little security for their safe keeping. Even now it is an easy matter to mislay or lose many of these original "borradors." We believe that this book was all made up at one time; there can be but little if any doubt that this is true of the sixty-eight leaves of sealed or stamped paper. First, because all of the sealed paper is of the stamp or seal of the same fiscal year, namely, 1831-1832. Second, because each of the pages has the rubrica of the same officer; and third, because this officer—Jose Maria Mendosa—was not treasurer general during all the years that this book purports to have been used. If our conclusions are right about this, the book was made from these original "borradors," and it is not a matter of wonder if in

making up this book, the officer failed to find many of these original drafts.

Keeper of the archives, Rochin, testifies: "There are a great many (records of grants) that are not in the *Toma de Razon*, and those issued during the month of April, 1838, are wanting, because that book of *Toma de Razon* was taken away from here of that date, some years ago. It is already five years since I have been in charge of the archives, and it was not here then. (Record, page 86.)

And Judge Robinson testifies that many grants, issued during the year 1838, were not mentioned or recorded in the Toma de Razon in 1881, when he made an examination of that book.

Record, pages 98-99.

It is true that Special Agent Tipton testified at Santa Fe that he had examined the Toma de Razon and found an entry of all the grants referred to by Mr. Robinson with the exception of one (a comparison of names given by each will show he should have excepted two). Mr. Tipton cross-examined said Robinson at Hermosillo, and it is unfortunate that he did not call his attention, or that of the judges of the court, to this error, if error it was, in the testimony of Judge Robinson. And then again Judge Robinson made examination of this book in 1881, and it would

seem from the testimony of Mr. Rochin that the book was missing for some time after that period.

Special Agent Hopkins reports to the government that there are in the archives of Sonora from 1,200 to 1,500 original expedienti of grants, and this book contains a note of only about 225 of these.

Record, page 179.

The objection that the grant is fraudulent and void rests mainly upon the allegation of counsel that it is not mentioned in the list of *Expedientis*, known as "Jimeno's Index. * * * Under the circumstances of this case, if the facts were as alleged, it would not be entitled to much weight."

U. S. vs. Auguisola, 1 Wall., 352.

Mr Aguilar

~~Both~~ Mr. Rochin and Mr. Robinson testify that there is a full record of the issuance of this grant in the office of the treasurer general of the state. The claimant should not be defeated by the failure to find a memorandum of the grant in a book so unworthy of credence as this Toma de Razon is shown to be. Nor can we believe that the misprision of a clerk, if such is the fact, in failing to make the memorandum, will be permitted to defeat an undoubted sale and conveyance to a good faith purchaser for a valuable consideration.

In conclusion—I have not attempted to follow each of the objections of a close technical nature urged by the learned counsel, in his able argument, because I am convinced that the rights of the claimant will be determined upon higher and broader principles. While this brief is being printed, I again read the argument of counsel, and think perhaps attention should be called to some of his observations, which I omitted in their regular order.

It is urged that the national laws of August 4 and 18, 1824, were repealed by the adoption of the constitution of 1836, and the subsequent legislation of 1837. There is nothing in this constitution or these enactments directly repealing these laws; nor can it be said that the laws of 1824 are inconsistent with those of 1836-1837. I have tried to demonstrate that the national government, after the change to the central system, expressly recognized, in a circular approved by the president of the nation, dated on the 25th day of May, 1838, hereinbefore quoted, that the old enactments were still in force. That such was the understanding of the Mexican authorities, is made certain and clear by the language used by President Jaurez, March 2, 1859, in approving a grant made in Lower California, to Emelio Leya and Juan Carlos Duprat, as follows:

"That in conformity with the instructions for the new founders of Lower California, issued by the royal commissioner, Count D. Jose de Galvez, in the town of Santa Anna, in that peninsula, the 12th of August, 1768, the law on colonization decreed by the sovereign general congress, on the 18th of August, 1824, and the supreme regulations for the *territories* of the republic, decreed on the 28th of November, 1828," etc.

Counsel asserts, on page 89 of his brief, that Sonora and Sinaloa was the only state of the Mexican republic that claimed the right to dispose of the public domain by virtue of the laws of August 4, 1824. It is possible that counsel is correct in this statement. I am, however, informed by high Mexican officials, and Mr. Frederick Hall, who is at least as familiar with the history of the different states of Mexico as any American lawyer, that counsel's statement is not correct, and that many of the other states of Mexico claimed the right to dispose of their lands by virtue of the law of August 4, 1824.

On page 90 of brief, it is said that on May 20, 1825, Sonora and Sinaloa passed a law for the disposition of the public lands, and made no reference to authority that the state had for so doing. I think it has been shown in the communication of the state congress to the governor of Sonora, of May 9, 1825, quoted

supra, and by section 293 of the state's constitution, that counsel is in error in this statement.

This court has confirmed the judgment of the Court of Private Land Claims, in the two cases appealed therefrom, in which a decision has been announced, and I am persuaded that counsel is scarcely justified (brief, page 23) in saying: "From the inception of the litigation before the lower court to the present, strong and persistent effort has been made, and in my opinion not always unsuccessful, to induce the Court of Private Land Claims to ignore the limitations and restrictions upon, as well as the legal sufficiency of proof which would justify a judgment of confirmation in any case."

These observations are followed by others of like kind, found at page 33 of brief.

It would seem that the learned justices of the court below have enforced obligations under treaty stipulations in a manner befitting a great nation, and have endeavored to follow the former adjudications of this court construing similar treaties. The opinion of counsel that congress intended by the passage of the present act to restrict or narrow the powers of the court, as before understood, is scarcely justified in view of the following, from Mr. Justice Shiras: "We do not so regard that provision (referring to the provisions of the act creating the Court of Private Land

Claims), nor do we perceive in any features of the act an intention on the part of congress to restrict the powers of the court recognized by the previous decisions."

We believe that law, equity and justice are in favor of the decision of the court below, and respectfully ask for its affirmation.

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In the Court of Private Land Claims.

JUAN PEDRO CAMOU,
vs.
THE UNITED STATES.

DISSENTING OPINION, MR. JUSTICE SLUSS.

Not being able to agree with the majority of the court in its conclusions in this case, and the questions involved being of importance as well as of interest, I have felt justified in recording my dissent from the conclusion of the majority of the court in this case.

The first question presented is, Did the state of Sonora, at the time of the making the grant in this case, have authority to make it as it was made?

On August 4, 1824, the federal congress of Mexico passed a law generally known as the law for the classification of the revenues.

This law somewhat minutely specified the revenues which thereafter should belong to the nation. These specifications are contained in the first nine articles. The ninth article is the only one providing for the revenue arising from land. This section in the original reads: "9. Los bienes nacionales, en los que se

comprehenden los de la inquisicion y temporalidades y cualesquiera otras fienas rusticus y urbanos que pertenieren o que pertenecieren en lo de adelante hacienda publica." This section is ordinarily translated: "9. National property, in which is included those from the inquisition and temporalities of the clergy, or any other rental or urban property which belongs or shall hereafter belong to the public exchequer."

By an examination of the original Spanish, it will be observed that the Spanish word which has been translated "property," in the expression "national property," is *bienes*, and that the Spanish word which has been translated property in the expression "any other rural or urban property" is *fincas*.

It will be conceded that any person familiar with the Spanish that neither of these words is ordinarily used to express the idea of vacant public lands, or public domain. *Bienes* is a word ordinarily used to convey the idea of property in its general sense, which has been reduced to actual use, and may consist of either chattels or realty, but is never used to mean distinctively vacant public land, nor in that sense. So that if we meet with this word in a law or any kind of document or speech, we would not be authorized to regard it as referring to the public domain

unless from the context it affirmatively appears to have been used in that sense.

The word *fiscus* signifies property; not property in a general sense, but a particular class of property, usually real property, which has at some time been reduced to private ownership, and capable of producing a revenue by its use or leasing. It seems to me reasonable to say that both these words were used in the sections under consideration in the same sense, and in the sense in which they were used in ordinary speech, which would exclude the idea of public domain.

Article XI. provided that the revenues not comprehended in the preceding articles should belong to the states.

In my opinion, therefore, the revenues, to be derived from the disposal of the public domain within the states were intended to belong to the states respectively.

This construction is strengthened by the following considerations:

The term "national property" in the article referred to is followed by a specification of the classes of property intended to be included.

The universal rule of construction is that, where general words in a statute are either preceded or followed by particular words, the general words will

be construed to refer to the particular class or classes named in the particular words, and their meaning limited accordingly. Construing article IX. by this rule, it follows that the only reference from real property reserved in the federation therein was that from the inquisition and temporalities, which, as we well know, were improved properties, and any other town or country property capable of producing a revenue by being used or leased.

The proceeding of the collection and disbursement of revenue is essentially an executive function, but, under a republican constitutional form of government like that of Mexico, the executive department could have no authority to collect revenue or dispose of the public land for that purpose except such as was conferred by a law of the national congress.

We may, therefore, naturally suppose that if it had been the purpose of the congress to reserve to the nation the revenues from the disposal of the public domain, there would have been provision made to carry such purpose into practical operation by authorizing the executive department to dispose of it, or by making it subject to the operations of the national treasury. Now the only provision found in the law of August 4, 1824, authorizing the disposal of real property belonging to the nation is article X., which reads, as translated: "The buildings, offices,

and the lands attached thereto, which belong or have belonged to the general revenues, and those which have been maintained by two or more of what were formerly provinces are at the disposal of the government of the federation." It will be observed that the class of real property described in this article, and which the government was authorized to dispose of, was of the exact same class which I have endeavored to show was reserved to the revenues of the federation in article IX.

The significance of this provision is seen when considered in connection with the provisions of the law of August 18, 1824, commonly known as the colonization law. It has never been questioned that the subject matter of legislation of the latter law was the vacant public lands.

Article III. provided that the congress of the states should provide for the colonization of the land within their respective limits, subject only to certain restrictions specified in the law itself.

Article XVI. provided that the government should proceed to the colonization of the territories, subject to the same restrictions. These two sections taken together show conclusively that the states were empowered by a system of colonization to be formulated by themselves, subject to the restrictions specified, to dispose of all of the public domain within their re-

spective limits, and that the executive department of the government was authorized by a system of colonization to be formulated by it, subject to the same restrictions, to dispose of the public domain within the limits of the territories, and within the territories only.

On September 21, 1824, a law was enacted providing for the collections and disbursements of the revenues of the federation. It authorized the executive to appoint in each state a commissary general of the different branches of the federal exchequer. Article IV. provided that this commissary should collect and disburse the proceeds from the revenue and the contingents of the state.

Article V. specified the revenues which he was authorized to collect, and among the others specified, the revenues from the same class of lands which I have endeavored to show were reserved to the federation by the law of August 4, 1824, and did not include any specifications applicable to the public domain.

It authorized this commissary to collect the "contingents of the states." These contingents were certain sums of money which were to be paid by the states to the federation, as provided for in the law of August 4, 1824. They were provided for as part of the same law with and are to be considered in the

light of the provision granting to the states the revenue from the public domain, and it seems reasonable to conclude that the one was the consideration for the other. When we consider these three laws together, and the fact that they were enacted by the same congress and within a few days of each other, they appear to be parts of the comprehensive and harmonious system for the colonization and disposal of the public lands and of providing a revenue as an incident thereto, which system was that of the vacant lands within the states should be disposed of and the revenue therefrom collected under the direction of the states respectively, in consideration of which the states were to pay to the federation the sums provided for in lieu of the revenue which the federation might obtain by the disposal of the vacant lands under its own direction for its own benefit. But whether my supposition as to the consideration for these contingents is correct or not, it seems to me incontrovertible that by this legislation the states were fully empowered to convey a good title to any or all the vacant public land within their limits.

In this connection it should be said that it is immaterial whether the legal title to these lands passed from the federation to the state. The federation could retain the fee and at the same time authorize the state to convey a good title, and this is my

opinion as to what was in fact done. Conceding to the states the right to revenue or proceeds of the sales of the public lands by implication conceded all of the power necessary or appropriate to make the right effectual. And as revenue could only be obtained by sales of the land, the power to make such sales passed with and as an incident of the right to obtain the revenue.

On April 6, 1830, the congress of the federation enacted a law, in article III. of which it was provided: "The government shall have power to appoint one or more commissioners to visit the colonies of the frontier states, to contract with their legislatures for the purchase, in the name of the federation, of the lands they may consider suitable and sufficient for the establishment of colonies of Mexicans and of other nations." And by article IV. it was provided: "The executive shall have the power to take the lands he may consider suitable for fortifications and arsenals and for new colonies, and shall give the states credit for their value on the account they owe the federation."

These provisions have reference to vacant public lands, and show that the federation recognized the fact that the states had a pecuniary interest in the lands of the public domain, and that these lands

could not be taken from the states without their consent and the allowance of their value therefor.

In all these Mexican statutes, it should be understood, the word "government" is used to denote the executive department, and the words government and executive are used interchangeably.

On January 26, 1831, a law was enacted by the congress of the federation, establishing a general department of the revenues, under whose control should be all branches of the exchequer administered for the federation, except the mail and the mint.

Article XIII. provided: "The proceeds from national property (bienes nacionales) shall be collected by commissioners under the immediate direction of the general department."

On July 7, 1831, there were issued regulations for carrying into effect the provisions of the foregoing law of January 26, 1831, it divided the operations of the treasury into three branches, and specified the particular revenues to be collected by each. In the first branch was placed "national property (bienes) in which is included under article IX. of the law of August 4, 1824, that of the inquisition and the temporalities and all other country or town property (fincas) belonging to the federation." There is no other provision or regulation for revenues from any other class of real estate, thus showing that pro-

ceeds derived from the vacant public domain did not pertain to the revenues of the federation.

On May 20, 1825, the state of Sonora enacted a law for the colonization and disposition of the vacant public lands within its limits. It provided for the raising revenue by means of the disposal by sale of the public lands, and further provided that no one could obtain any part of the public lands who did not show that he required the lands for his actual use and occupancy. The constitution of the federation required that copies of all laws enacted by the states should be certified to the congress of the federation, which was given power to repeal or nullify any objectionable law so enacted by the state.

We are compelled to indulge the presumption that this requirement of the federal constitution was complied with, and that the federation had full notice of this law of Sonora.

This law was never at any time repealed or nullified by the congress of the federation. These circumstances afford the most convincing proof of a practical construction given by the federation to its own laws of August 4 and 18, 1824, and that such construction was to the effect that the states were empowered to convey title to the public lands.

It was during the time when the law of August 4, 1824, and the law of August 18, 1824, and the law

of May 20, 1825, of the state of Sonora were in force that the grant of land in question in this case was made.

In the light of the legislation I have recited, I can come to no other conclusion than that the grant, when made, was good and valid.

There has been a contention that the law of May 20, 1825, was invalid, for the reason that it was not a law for the colonization, but a law for the sale of the public lands.

I think, as I have before intimated, that a fair interpretation of the law shows that no part of the public lands could be obtained under it except for purposes of actual use and occupancy.

It did not require actual inhabitancy of the land by the grantee, but I have no knowledge of any colonization law of either Spain or Mexico which required actual inhabitancy by the grantee of the granted land except in cases of empressario contracts, and no such law has been called to our attention.

The fact that it made the raising a revenue an incident or feature does not destroy it as a colonization law. From the very beginning, both under the Spanish and Mexican rule, the securing a revenue from the proceeds of the public lands was made a more or less prominent feature of colonization. Requiring the

grantees to pay something for the land is not repugnant to the idea of colonization. A very striking illustration of the Mexican conception of the matter is shown by the law enacted by the federal congress, April 4, 1837, which provided that the government, in concurrence with the council, should proceed to make effectual the *colonization* of the public lands by sales, leases or mortgages; showing that a sale of public land was in harmony with the idea of colonization.

But to my mind the conclusive answer is to be found in the fact that the law of the state of Sonora providing for the sale of the public lands within its limits was permitted to remain in force for so many years unrepealed and not interrupted with, and the further fact that during the time from the enactment of the law of Sonora until April 4, 1837, there was no law of the federal congress in force authorizing any office of the federation to dispose of any of the public lands within the state of Sonora.

In my opinion, therefore, the grant in this case was valid, and vested in the grantees a right and property in the land granted such as is protected by the provisions of the treaty known as the Gadsden purchase, and such as is protected by the principles of public law in the absence of treaty stipulation on the change of sovereignty over the land.

The next question is as to whether the right of property which the original grantee obtained was taken from him by the decree of Santa Anna, issued November 25, 1853.

This decree was issued by Santa Anna as president of the republic of Mexico. It reads:

"Article I. It is declared that the public lands, as the exclusive property of the nation, never could have been alienated under any title by virtue of decrees, orders and enactments of the legislatures, governments or local authorities of the states and territories of the republic.

"II. Consequently it is declared that the sales, cessions, or any other class of alienation of said public lands that have been made without the express order and approval of the general powers, in the manner prescribed by the laws, are null and of no value or effect."

This decree was not issued under the authority of any law of the congress of the republic, or of the constitution, but depends for its validity, in so far as it attempts to deprive the grantees of the rights of property vested in them by the sales in question, upon whatever power Santa Anna possessed as president of the republic.

Santa Anna was president of the republic. The powers and functions he exercised were delegated

powers. The president was the executive of the nation, not its law-maker nor its judiciary. In Mexico the lives and property rights of the citizens were as inviolate as they are in the United States. There never was delegated to the executive the power to deprive any citizen of his property. We can not assume that Santa Anna had such power from the bare fact that he undertook to exercise it, but before we act on such an assumption it should be made to plainly and clearly appear.

As is well known, the statute of the Mexican nation was based upon the declaration of principles contained in the plan of Iguala.

By article XII. of that instrument it was declared: "All inhabitants, without other distinction than their merits and virtues, are citizens, with the right to choose their own vocations."

Article XIII.: "Their persons and property shall be respected and protected."

On October 4, 1824, a permanent constitution of the nation was adopted, in which it was declared: "Article CXLVII. Confiscation of property is forever prohibited. Article CXLVIII. Every judgment by special commission and every retroactive law is forever prohibited." This constitution was readopted August 22, 1846.

These show the fundamental principles as to the rights of property on which civil government in Mexico was deemed to be based.

Santa Anna was elected chief executive of the republic in pursuance of what are known as the plan of Guadalajara and plan of Jalisco, finally adopted February 6, 1853.

The first declaration contained in the plan of Guadalajara is: "The Mexican nation is one alone and indivisible, constituted under the popular representative system." This declaration seems to me to exclude the idea that the chief executive could have other than delegated powers. Autocratic power is inconsistent with and repugnant to the idea of a popular representative system.

Article II. of the plan of Jalisco provided: "That the executive power, which shall be elected in conformity with this agreement until the new political constitution yet to be found shall be promulgated, shall have the necessary faculties for the re-establishment of social order; to organize the public administration; to form the national treasury; and to expedite the functions of the judicial department, introducing into the same necessary reforms without interfering with its independence." These are the powers delegated. They were all executive in character. He was not given legislative power, and the very dec-

laration recognizes the existence of a separate judiciary, which was to be wholly independent. He was not delegated the power to determine what laws of the nation were or were not constitutional, or what laws of the states should or should not be appealed. There is not a word or a line indicating that his powers were not limited by the fundamental principles of the rights of property of which the nation was constructed. I am of the opinion, therefore, that the decree of November 25, 1853, could not and did not have the effect to deprive the grantees of the right of property in the land which was vested by the grant, and that this right of property in the land existed as completely at the time of the taking effect of the treaty of cession as did prior to the issuance of Santa Anna's decree.

It is supposed that Santa Anna was authorized to determine whether, as a matter of law, the grants of land were valid as against the general government. But no law of the nation can be found conferring upon him any such function. Under the Mexican system the national congress was the judge of the constitionality of the laws it enacted. But Santa Anna was only chief executive and not the congress, and no law is to be found conferring upon him the functions of the congress in this respect; and as I have before remarked, his assuming to exercise the power was

not of itself sufficient to create the power, nor sufficient evidence of the existence of the power. Therefore his declaration that the law of Sonora under which the grant was made was nuil, was not binding upon the grantees, nor did it have the effect of a judicial determination against them. There can be no such thing as a judicial determination without a hearing, even in much-misaligned Mexico.

The next and more serious question in the case arises upon the contention: First, that by the treaty of cession the United States has recognized the authority of Santa Anna to determine the status of all of the property within the ceded territory at the time of the treaty, and that his determination being so recognized, is binding. And second, that the declaration of Santa Anna that all grants of land made by the state of Sonora were null operated as an inducement to the treaty, and therefore became binding in favor of the United States.

A treaty like the one in question has two distinct phases. In the first place, it operates as a contract between the parties to it, and, as such, is to be construed like contracts between individuals. In the second place, it operates as a law or statute affecting the citizen, and binding his person and property in the same manner as any other law.

A treaty affects the property rights of the citizen as a law, and because it is a law, and as the supreme law of the land.

As a contract between the two nations those matters which operated as an inducement to its execution may, perhaps, properly be considered as entering into and binding upon the parties as contractors, although not written into its terms.

But as a law affecting his rights of property, the citizen is only affected by what is expressed in the treaty. A citizen's rights of property may be taken from him by a treaty as the supreme law of the land, but it is the terms of the treaty and the terms of the treaty alone which has this effect, and not some extrinsic ulterior fact operating upon one of the contracting parties as an inducement to enter into it.

The point I wish to make is, that for the treaty to be held to have recognized Santa Anna as having authority to determine and declare the status of the property ceded as to being public or private, it must have been expressed in the treaty itself. In order that the declaration of Santa Anna, that all grants of land made by the state of Sonora were void, be held to be confirmed by virtue of the treaty, a provision to that effect must have been made part of the treaty itself. How can the citizen know what is made part

of a law except what he can see has been actually incorporated into it?

I do not know that this precise question has been directly decided by the Supreme Court, but there are a few cases illustrating to an extent the proposition I am discussing. It is generally held, and by the Supreme Court of the United States, that a treaty takes effect from its execution, and that ratification related back to the date of signing. The case of Haver vs. Yaker, 9 Wall., 32, however, holds that this is true only in so far as the treaty operates as a contract, and that in so far as it operates as a law affecting the personal rights of the citizen, it takes effect only from the date of ratification. The idea expressed is, that a citizen can not be affected in his personal rights by a treaty any further than he can know what it is.

In the case of United States vs. Yorba, 1 Wall., 412, a question arose on the treaty of Guadalupe-Hidalgo. In the regulation of that treaty a declaration was made on behalf of Mexico, that no grants of land had been made in the territories after the 13th day of May, 1846. The United States resisted a confirmation of a claim on a grant made after that date. The court says that even had the treaty been concluded in reliance upon the truth of the declaration, that fact could not affect the rights of parties who, subsequent to the date specified, obtained grants of land from

the governors of California while their authority and justification continued; and that the rights of the citizens to their property depends upon the authority of the officers to make the grant at the time that it was made, and not upon the subsequent declaration of the commissioner to negotiate the treaty on the subject.

It is easy to see the reason of the principle announced by the court. The declaration was not made part of the treaty, and did not become part of the law of the treaty, and therefore not binding as a law upon the citizen as to his private property. The case of Doe vs. Braden, 16 How., 635, is an interesting one, as illustrating the point in question.

After the negotiation of the treaty between the United States and the king of Spain for the cession of Florida had been begun, the king made certain grants to large tracts of land within the limits of the proposed cession. After the treaty had been signed, but before ratification, the fact came to the knowledge of the United States. Before the United States would ratify the treaty, Mr. Adams, secretary of state, insisted that a written declaration, to the effect that the grants were thereby annulled, should be made by the king and attached to and made a part of the treaty, which was finally done. The court held that by reason of the declaration of the king having

been attached to and made a part of the treaty, it became a law binding upon the grantees of the land, and as such law had the effect to annul the grants. A careful study of that case, it seems to me, shows that it is a recognized principle, that the declarations of one of the contracting parties outside the treaty, although made and operating as an inducement to the treaty, can not affect the private rights of the individuals, unless they are incorporated with and made part of the treaty itself. It was not the declaration of the king of Spain which had the effect to annul the Alagon grant, but it was the treaty entered into by the United States government, and which became the supreme law of the land, that annulled the grant.

The negotiation of the treaty of cession by the United States with Santa Anna was a recognition of his authority to make it, and of his authority to cede by means of the treaty all that the republic of Mexico owned within the ceded territory. But it was not an adjudication of what the nation did own within these limits. It was a recognition of his authority to make all of the stipulations and provisions which were contained in the treaty. And if the treaty had contained a clause declaring all grants of land made by Sonora to be void, it would have been a recognition of his authority to insert such a clause, and the treaty

with such a clause inserted would have invalidated all such grants. But this would not have been a recognition of the power of Santa Anna to do what he attempted by his decree of November 25, 1853. The effect of the treaty would in no way have depended upon that decree; the grants would have been null, because the treaty so declared, and not because Santa Anna has so declared as an inducement to the treaty. In other words, then, recognition of Santa Anna as the treaty-making authority, was not the recognition of the existence of any other power claimed or exercised by him, or of his power to affect the private rights of individuals in any other way than by means of provisions inserted in the treaty itself.

The treaty-making authority of the United States is the president and the senate. Suppose the president should issue a decree to the effect that all patents issued on desert land entries in Arizona were without lawful authority and void, and that his decree should be ratified by a resolution of the United States senate. We would all say the proceeding was wholly void, and did not deprive the patentees of their property in the land. The fact that the president and the senate constitute the treaty-making powers, does not show that they have any other power, or that they can affect private rights in any

other way than by means of the express terms of the treaty.

But suppose that a month, or any other period, after making such decree by the president, a treaty should be made by the president and ratified by the senate, ceding the state of Arizona to Mexico, in which no mention should be made of the validity or invalidity of desert land entries—would we say that fact altered the legal effect of the prior decree of the president declaring them void? Certainly not. And yet, if the treaty they made contained a clause nullifying all such entries, or declaring them to be void, we would all say that the entries were rendered null —not by reason of the prior decree of the president, but by reason of the clause contained in the treaty. It is certainly true that the treaty-making power of the country has the power to declare the status of all of the property that it cedes by treaty to another country; but it is equally true that the only way in which such declaration of status can be made to affect private rights is by means of the treaty itself. The declaration must be the declaration of the treaty in order to affect private rights. In the case of the Gadsden treaty, there was a specification of the class of grants of the land within the ceded territory which would not be recognized. If it had been the intention of the United States to confirm by the

treaty Santa Anna's decree of confiscation, and to nullify all grants of land made by Sonora, that sense of fairness recognized by those of the slightest moral instinct would have required it to say so in manly terms.

The treaty contains no hint that state grants are to be regarded as invalid; on the contrary, by its silence on this subject, such grants are permitted to stand upon their own merits as to validity. Santa Anna's decree is left to be tested by his authority to make it. If valid by its own force, then grantee under state grants had no property in the lands granted to be protected by the treaty. If void, then the grantees had a property in the lands granted, notwithstanding the decree which is protected by the treaty.

I am of the opinion, therefore, that the grant in this case was valid when made; that it was not affected by Santa Anna's decree, and that the right of property originally vested under it is protected by the treaty, and I am authorized to say that Associate Justice Stone concurs with me in the opinion.

HENRY C. SLUSS,
Associate Justice.